No. 87-709

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF WISCONSIN,

Respondent,

v.

THOMAS D. TRUDEAU,
TRUDEAU DEVELOPMENT, INC.,
TRUDEAU CONSTRUCTIONS, INC.,
SUPERIOR DEVELOPMENT, INC.

Petitioners.

and

THE ASHLAND COUNTY BOARD OF ADJUSTMENT,
LARRY HILDEBRANDT, ASHLAND COUNTY
ZONING ADMINISTRATOR.

PETITIONERS APPENDIX

SAMUEL J. RECHT
(Counsel of Record)
DAVID L. PETERSEN
SUSAN LaCAVA
QUARLES & BRADY
411 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-4497
(414) 277-5000
Counsel for Petitioners

October 27, 1987

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SEPARATELY BOUND APPENDIX

APPENDIX A

No. 85-0818

STATE OF WISCONSIN : IN SUPREME COURT

State of Wisconsin,

Plaintiff-Appellant,

v.

FILED June 11, 1987
Marilyn L. Graves
Clerk of Supreme Court
Madison, Wisconsin

Thomas D. Trudeau, Trudeau Development, Inc., Trudeau Construction, Inc., Superior Development, Inc.,

Defendants-Respondents-Petitioners,

The Ashland County Board of Adjustment, Larry Hildebrandt, Ashland County Zoning Administrator,

Defendants-Respondents.

REVIEW of a decision of the Court of Appeals. *Affirmed.*

STEINMETZ. J. The first issue as presented by the parties is whether the land lying below the ordinary high water mark (OHWM) of Lake Superior, which is naturally subject to the flow of water to and from the lake, is part of the bed of Lake Superior even though the water which inundates the site is not navigable. The Ashland county circuit court, the Honorable William E. Chase, held that the disputed property was not lakebed because the plain-

tiff, state of Wisconsin, failed to prove that the condominium project site was navigable. The court of appeals, in an unpublished decision, reversed holding that the actual navigability of the site is irrelevant if the land lies partly under the OHWM of Lake Superior and found, on the basis of what it termed positive, uncontradicted testimony, that the site is partly the bed of Lake Superior because it is naturally below the ordinary high water mark of the lake and subject to the ebb and flow of the lake.

The second issue is whether the court of appeals committed error in supplementing the findings of the trial court on the issue of the natural connection of the project site to Lake Superior. The trial court failed to make any findings on the relative elevations of the project site and the ordinary high water mark of Lake Superior. Although the trial court found that the project site was subject to inundation by water from Lake Superior, it dismissed the state's lakebed claim on the basis that the site was not navigable. The court of appeals found that there was evidence that part of the site was under the OHWM of Lake Superior and that there was a water connection between the site and the lake with water flowing between the site and lake, and, therefore, remanded the case to the trial court to determine what part of the site if any is below the OHWM.

The third issue is whether doctrines of accretion or reliction have any application to a dispute over land not submerged by the waters of Lake Superior when those waters reach the elevation of the lake's ordinary high water mark. The trial court found that the doctrine of reliction operated to give title to the defendants, Thomas D. Trudeau, Trudeau Development, Inc., Trudeau Construction, Inc., and Superior Development, Inc., real estate developers, because the connection of the site to the lake had receded to the point of rendering use of the land as an incident of navigation improbable. The court of appeals held that the doctrine of reliction has no application to the submerged lands.

The fourth issue is whether the facts of this case certiorari review under sec. 59.99, Stats.,[1] is the state's exclusive means of challenging a floodplain zoning variance. The trial court held that certiorari review was the state's exclusive means of challenging a decision to grant a floodplain zoning variance and found that the state had failed to pursue review within the time provided by the statute. The court of appeals held that sec. 87.30(2),[2] provided the

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[1]Sec. 59.99(1) and (10), Stats., provides:

"59.99 *County zoning, adjustment board.* (1) APPOINTMENT, POWER. The county board may provide for the appointment of a board of adjustment, and in the regulations and restrictions adopted pursuant to s. 59.97 may provide that such board of adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained. Nothing in this subsection shall preclude the granting of special exceptions by the county zoning agency designated under s. 59.97(2)(a) or the county board in accordance with regulations and restrictions adopted pursuant to s. 59.97 which were in effect on July 7, 1973 or adopted after that date."

"(10) CERTIORARI. Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any taxpayer, or any officer, department, board or bureau of the municipality, may, within 30 days after the filing of the decision in the office of the board, commence an action seeking the remedy available by certiorari. The court shall not stay proceedings upon the decision appealed from, but may, on application, on notice to the board and on due cause shown, grant a restraining order. The board of adjustment shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof. If necessary for the proper disposition of the matter, the court may take evidence, or appoint a referee to take evidence and report findings of fact and conclusions of law as it directs, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify, the decision brought up for review."

[2]Section 87.30(2), Stats., provides as follows:

"(2) ENFORCEMENT AND PENALTIES. Every structure, building, fill, or development placed or maintained within any floodplain in violation of a zoning ordinance adopted under this section, or s. 59.97, 61.35 or 62.23 is a public nuisance and the creation thereof may be enjoined and maintenance thereof may be abated by action at suit of any municipality, the state or any citizen thereof. Any person who places or maintains any structure, building, fill or development within any floodplain in violation of a zoning ordinance adopted under this section, or s. 59.97, 61.35 or 62.23 may be fined not more than $50 for each offense. Each day during which such violation exists is a separate offense."

state with an alternative means of challenging a floodplain zoning variance.

This action concerns a parcel of land being developed for a 48-unit, eight-building, residential condominium project. Six of the units in one building were constructed prior to the commencement of this action and substantial sums of money have been invested in the project.

The state of Wisconsin commenced this action on August 16, 1984. The various claims in the amended complaint relate to two sets of parties: a group of real estate developers and several local zoning officials or agencies. The Ashland County Board of Adjustment, Larry Hildebrandt, Ashland County Zoning Administrator and Thomas D. Trudeau, Trudeau Development, Inc., Trudeau Construction, Inc. and Superior Development, Inc. (the developers) were alleged to have violated sec. 30.12, Stats.,[3] by allowing construction and constructing condominiums and a parking lot on the bed of Lake Superior.

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[3]Sec. 30.12(1)(b), (2), (3)(a)4 and (b), Stats., provides in relevant part:

"30.12 *Structures and deposits in navigable waters prohibited; exceptions; penalty.* (1) GENERAL PROHIBITION. Except as provided under sub. (4), unless a permit has been granted by the department pursuant to statute or the legislature has otherwise authorized structures or deposits in navigable waters, it is unlawful:

". . .

"(b) To deposit any material or to place any structure upon the bed of any navigable water beyond a lawfully established bulkhead line.

"(2) PERMITS TO PLACE STRUCTURES OR DEPOSITS IN NAVIGABLE WATERS; GENERALLY. The department, upon application and after notice as provided under s. 31.06 and hearing, may grant to any riparian owner a permit to build or maintain for the owner's use a structure otherwise prohibited by statute, if the structure does not materially obstruct navigation or reduce the effective flood flow capacity of a stream and is not detrimental to the public interest. The procedures in this subsection do not apply to permits issued under sub. (3).

". . .

(Footnote 3 continued on next page)

The developers obtained a variance at a hearing before the Ashland County Board of Adjustment on January 13, 1984. The state did not seek review of the decision pursuant to sec. 59.99(1), Stats., within 30 days. The state later commenced an action against the developers alleging that the construction was not, could not have been, authorized and lawful. The trial court dismissed all of the state's claims after a trial.

According to the state, the first meeting regarding the site was on November 1, 1983, at the site. After being discouraged by the Department of Natural Resources (DNR) representative, the developers withdrew their existing plans. The DNR did not receive any other plans. The next the DNR heard of the matter was when it was notified of the variance hearing before the Ashland County Board of Adjustment in January, 1984. By that time, the project pilings were in, walls were up and deck floors were in so that the variance was granted after the fact of partial construction.

The state requested injunctive relief requiring the removal of structures found to be in violation of sec. 30.12, Stats., or local zoning ordinances, the prohibition of further construction on the lakebed, and an order vacating the land use permit and floodplain zoning variance given to the developers.

The controversy concerns a real estate development known as the Marina Point Condominiums on Madeline Island in Ashland

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(Footnote 3 continued)

"4. Place crushed rock or gravel, reinforced concrete planks, adequately secured treated timbers, case in place concrete or similar material on the bed of a navigable stream for the purpose of developing a ford if an equal amount of material is removed from the stream bed.

"(b) A person who seeks to place structures or deposits under par. (a) shall apply to the department for a permit. The department shall review the application and inspect the location involved. The department may disapprove the application if it finds the proposed structure or deposit will materially impair navigation or be detrimental to the public interest. The department shall issue the permit or notify the application in writing of the disposition of the application."

county, Wisconsin. The developers' plans are to build 48 condominiums in a series of clusters. The first set of six condominiums, known as Cluster A, has already been built and the units placed for sale. The building site is immediately across Old Fort Road from the Madeline Island marina and immediately south of Mondamin Trail. A golf course is adjacent to the site on its inland side. Cluster A has been built on stilt-like pilings and much of the land underlying the structure and the remainder of the site is covered by standing water which was as deep as 1.2 feet in October, 1984. The water on the site is connected by several culverts to Lake Superior, at least one running under Old Fort Road into the marina and another running under Mondamin Trail. (See Exhibit 1 attached to this opinion.)

There is generally some water on the project site and some aquatic-type vegetation. The project site itself is not "navigable" in the sense of paddling a canoe. The source of the water on the property is not entirely clear. There was evidence received that 1.3 million gallons of water per week drained from the golf course onto the project site in the summer. Water also came through the culverts from Lake Superior when high winds arose. Both parties agree the culverts' purpose was to allow water to drain to Lake Superior rather than accumulate on the project site. The state argues that the culverts were not placed under the Old Fort Road to flood the developers' project but to allow water accumulating there to reach the lake. If the culverts were not there, it is argued the project site would flood and run across the road to Lake Superior or the site would accumulate water and become lakebed itself.

The trial court found that water flows both ways through these culverts, sometimes draining the Marina Point Condominiums site into the main body of Lake Superior and sometimes further flooding the site with water coming in from the marina.

The trial court made no finding as to the elevation of the ordinary high water mark (OHWM) of Lake Superior or of the elevations of the surface of the water or the underlying land at the Marina Point Condominiums site as compared to the OHWM of Lake Superior. The trial court found there was "no distinct mark

on the project property" and that the disputed property was separated from Lake Superior as a navigable body of water by Old Fort Road, an artificial barrier. The state introduced the only evidence regarding the OHWM of Lake Superior.

Contrary to the developers' argument, sec. 59.99(10), Stats., is not the exclusive means of state jurisdiction over floodplain zoning. Section 87.30 and sec. NR 116.22(4), Wis. Adm. Code, provide that the state may seek abatement of violations of floodplain zoning.[4] Section 87.30(2) establishes a cause of action to enjoin a public nuisance whenever there exists a violation of any local floodplain zoning ordinances. The state of Wisconsin, by the attorney general, is authorized to bring actions to enjoin such

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[4]Sec. NR 116.22(4), Wis. Adm. Code provides as follows:

"(4) ENFORCEMENT. The department shall assist municipalities in achieving a consistent statewide approach to floodplain enforcement. This assistance may include, but is not limited to, the measures listed in this subsection.

"(a) The department may request that corrective action be taken by the municipality where construction is occurring in a floodplain area which is either contrary to an existing floodplain zoning ordinance or which would be contrary to an approved floodplain zoning ordinance. Such corrective action may include, where appropriate, the following:

"1. Active prosecution of violations of the floodplain zoning ordinance;

"2. An injunction to stop construction until an adequate floodplain zoning ordinance can be adopted and approved by the department; and

"3. Adoption of an adequate floodplain zoning ordinance and submittal to the appropriate department district office for approval.

"(b) The department may seek an injunction to stop construction in the floodplain area until an adequate floodplain zoning ordinance is adopted and approved.

"(c) The department may seek an injunction to stop construction in the floodplain area when the construction would violate an approved floodplain zoning ordinance or the provisions of this chapter.

"(d) The department may seek adoption of an adequate floodplain zoning ordinance in accordance with the provisions of s. 87.30(1), Stats., or an upgrading of a floodplain zoning ordinance in accordance with s. NR 116.05.

"(e) The department may seek an injunction for abatement or removal or a fine or both for any violation of a floodplain zoning ordinance in accordance with s. 87.30(2), Stats."

nuisances. To regard certiorari as the exclusive means of review would render the language of sec. 87.30(2), Stats., meaningless which is a construction the courts should avoid. *Associated Hospital Service v. Milwaukee*, 13 Wis. 2d 447, 463, 109 N.W.2d 271 (1961).

Section 30.12 and ch. 30, Stats., generally codify a number of common law doctrines regarding the ownership of the beds of navigable waters. This court stated in *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 425, 84 N.W. 855 (1901):

> "The title to the beds of all lakes and ponds, and of rivers navigable in fact as well, *up to the* line of ordinary high-water mark, within the boundaries of the state, became vested in it at the instant of its admission into the Union, in trust to hold the same so as to preserve to the people forever the enjoyment of the waters of such lakes, ponds, and rivers, to the same extent that the public are entitled to enjoy tidal waters at the common law." (Emphasis added.) *See also State v. McDonald Lumber Co.*, 18 Wis. 2d 173, 176, 118 N.W.2d 152 (1962).

This is as true of the beds of the Great Lakes as it is of lesser inland waters.

In *Muench v. Public Service Comm.*, 261 Wis. 492, 501-02, 53 N.W.2d 514, 55 N.W.2d 40 (1952), the court stated:

> "At an early date in its history the Wisconsin court put itself on record as favoring the trust doctrine, that the state holds the beds underlying navigable waters in trust for all of its citizens, subject only to th qualification that a riparian owner on the bank of a navigable stream has a qualified title in the stream bed to the center thereof."

Title to the lakebeds passed to the state upon statehood. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 230 (1845) stated:

> "First, The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, The new states have the same rights, sovereignty, and jurisdiction over this subject as the original states."

Section 30.12, Stats., is a codification of the common law restriction against encroachments on publicly held lakebeds. *See Hixon v. Public Service Comm.*, 32 Wis. 2d 608, 616, 146 N.W.2d 577 (1966).

We have distinguished between state owned lakebed and the uplands[5] capable of private ownership in *Diana Shooting Club v. Husting*, 156 Wis. 261, 272, 145 N.W. 816 (1914) when we stated:

> "By ordinary high-water mark is meant the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. *Lawrence v. American W. P. Co.*, 144 Wis. 556, 562, 128 N.W. 440. And where the bank or shore at any particular place is of such a character that it is impossible or difficult to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark."

For purposes of determining the extent of control of the public trust "it is immaterial what the character of the stream of water is. It may be deep or shallow, clear or covered with aquatic vegetation." *Id.*

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[5]"Uplands — Land bordering bodies of water but above the high water mark." The Real Estate Dictionary (3d ed. 1984).

The trial court used the incorrect legal standard when it acknowledged the connection of the lake to the property by water flowing to and from the site but decided the land was not Lake Superior lakebed because of the state's "failure to prove that the project land is navigable."

The question of whether the facts in a particular case fulfill a particular legal standard is a question of law which this court will review. *Hennekens v. River Falls Pol. & Fire Comm.*, 124 Wis. 2d 413, 424, 369 N.W.2d 670 (1985). Where a trial court bases its decision on a mistaken view of the law, its decision constitutes an abuse of discretion as a matter of law. *Schmid v. Olsen*, 111 Wis. 2d 228, 237, 330 N.W.2d 547 (1983).

An area need not be navigable to be lakebed. If the land is part of the navigable lake, then the fact that the specific area cannot be navigated is irrelevant to the state's claim. Lakebed may be heavily vegetated by plants rising far above the water. The court of appeals stated in *Houslet v. Natural Resources Department*, 110 Wis. 2d 280, 287, 329 N.W.2d 219 (Ct. App. 1982):

> "[T]he public interest in and title to the navigable waters in this state attaches to more than the open and perpetually navigable waters contained in lakes, rivers and streams. It extends to areas covered with aquatic vegetation within the ordinary high water mark of the body of water in question."

Public ownership of the bed applied whether the water is deep or shallow. *Diedrich v. The N. W. U. R'y. Co.*, 42 Wis. 248, 266 (1877) stated:

> "And the reason of the rule [that the public trust of the lakebed or river bottom cannot be part of private lands] applies equally, whether the water immediately next the shore be shoal or deep. For the fee is equally in the public; even the shoal water next the shore may aid the public use, and may deepen or be deepened, so as to become practically capable of navigation."

The developers' reliance on *DeGayner & Co. v. DNR*, 70 Wis. 2d 936, 236 N.W. 2d 217 (1975) is misplaced. *DeGayner* answered the question? "what is a 'navigable stream'"? Lake Superior is admittedly navigable, and therefore *DeGayner* does not assist in analysis. The issue in the current case is where a navigable body of water is identified, what are the boundaries of the public trust associated with the bed of that body of water. Lake Superior is navigable and if the non-navigable site is a part of the lake, then the land below the OHWM is held in trust for the public.

The rights Wisconsin citizens enjoy with respect to bodies of water held in trust by the state include the enjoyment of natural scenic beauty as well as the purposes of navigation, swimming and hunting. In *Just v. Marinette County*, 56 Wis. 2d 7, 17, 201 N.W.2d 761 (1972) we stated the public has a present right to preserve natural resources such as wetlands because wetlands:

> "[S]erve a vital role in nature, are part of the balance of nature and are essential to the purity of the water in our lakes and streams. Swamps and wetlands are a necessary part of the ecological creation and now, even to the uninitiated, possess their own beauty in nature."

The trial court found the state failed to prove the "height and sufficiency of the hydraulic connection." It appears from the record the trial court was referring to the supposed absence of evidence relating to the height of the culverts connecting the site with Lake Superior, not the absence of evidence as to the pre-existing conditions of the naturally occurring inlet where the marina was built. It is obvious that hydraulic connection has no meaning other than being connected by water. There is a great deal of evidence in the record that historically shows an open-water inlet crossing under the Old Fort Road and extending east into a wetland on the inland side of the road. The court of appeals did not err in finding that the site is part of a basin naturally connected to Lake Superior.

Developers argue that they submitted proof of a chain of title to the site demonstrating that the site was never lake bed. The original federal patent to the site was dated April, 1856, approx-

imately eight years after Wisconsin became a state. As of the date of statehood, Wisconsin obtained absolute title to the beds of navigable waters like Lake Superior which could not be defeated by a subsequent federal patent relating to the lands. *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977). *See also Angelo v. Railroad Commission*, 194 Wis. 543, 550, 217 N.W. 570 (1928).

The trial court did not find nor is there any evidence to support the fact that the project site is entirely dry land above the OHWM of Lake Superior. There is no evidence nor finding that would support a legal conclusion that the doctrine of reliction has any application to this case.[6]

The developers also argue they are entitled to the land under the operation of accretion. That doctrine, like reliction, relates only to land above the OHWM. Accretion refers to dry lands which no longer form part of the bed of a water body. *De Simone v. Kramer*, 77 Wis. 2d 188, 197, 252 N.W.2d 653 (1977): "Accretion has been defined as 'the increase in land caused by the gradual deposit by water of materials on the shores, which deposit replaces the water at this location with dry land'." The doctrine of accretion is not relevant since the state claims only lands lying below the OHWM.

The trial court made an error of law when it assumed that the site itself had to be navigable in fact in order to be considered Lake Superior lakebed. The state holds in public trust "[t]he title to the beds of all lakes . . . up to the line of ordinary high-water mark . . . ." *Illinois Steel*, 109 Wis. 418, 425. The state regulates navigable waters through sec. 30.12(1), Stats. The question is whether some or all of the project site is within Lake Superior's OHWM, not whether it is navigable.

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[6]Black's Law Dictionary (5th ed. 1979) defines "reliction" as: "An increase of the land by the permanent withdrawal or retrocession of the sea or a river. Process of gradual exposure of land by permanent recession of body of water."

The trial court failed to make OHWM findings even though the state presented evidence establishing Lake Superior's and the site's OHWM. The DNR's area water management specialist, Richard Knitter, testified that he determined the Lake's OHWM approximately one-half mile from the site at a protected location with a clear erosion line that was free from excessive wave action. Knitter then determined that this site's elevation was 602 feet I.G.L.D.[7] He transferred the elevation of the OHWM site to a number of points at the project site and concluded that approximately half of the site was below Lake Superior's OHWM.[8] The developer's surveyor did not determine the OHWM of the site or Lake Superior.

In *State v. McFarren*, 62 Wis. 2d 492, 498, 215 N.W.2d 459 (1974), we stated:

> "The term 'ordinary high-water mark' was most recently defined in *State v. McDonald Lumber Co.* [(1962), 18 Wis. 2d 173, 176, 118 N.W. 2d 152, quoting from *Diana Shooting Club v. Husting* (1914), 156 Wis. 261, 272, 145 N.W. 816]:
>
> > "'"By ordinary High-water mark is meant the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. *Lawrence v. American W. P. Co.*, 144 Wis. 556, 562, 128 N.W. 440. And where the bank or shore at any particular place is of such a character that it is impossible or difficult to ascertain where the point of ordinary high-water mark

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[7]I.G.L.D. is an abbreviation for International Great Lakes Datum, a reference system used for expressing elevations in the Great Lakes area.

[8]The ordinary high water mark transfer rule was developed to promote certainty and ascertain property rights in riparian lands. An ABA publication strongly recommends its ascertainment prior to construction. *Real Property, Probate and Trust Journal*, Vol. 18, No. 3 (Fall 1983).

> is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark.'"
>
> "In *McDonald* it was stated that the state's title to the lake bed runs to the ordinary high-water mark." (Footnotes omitted.)

The trial court did not make a finding whether the site was connected by water to Lake Superior; however, the trial judge did make this observation, "sometimes water goes into the culvert . . . from the marina onto the project property and sometimes it flows out from the project property . . . ."

Knitter analyzed several aerial photographs of the site as it existed in 1939 and 1950, the government survey maps, the site's present configuration, and stereo photographs offering a three-dimensional view of the site indicating elevation and from these sources he concluded that the project site was originally part of the basin, which was enlarged to become the present marina. The developers' expert did not directly refute this evidence.

When the physical facts are unquestionably established, testimony to the contrary must give way. *Pappas v. Jack O. A. Nelsen Agency, Inc.*, 81 Wis. 2d 363, 369, 260 N.W.2d 721, 724 (1978). In *Thiel v. Damrau*, 268 Wis. 76, 85, 66 N.W.2d 747, 752 (1954), the court stated: "Positive uncontradicted testimony as to the existence of some fact, or the happening of some event, cannot be disregarded by a court or jury in the absence of something in the case which discredits the same or renders it against the reasonable probabilities."

The positive and uncontradicted testimony of Knitter that the OHWM of Lake Superior is 602 I.G.L.D. and that the project site was and is hydraulically connected to and is in fact a part of Lake Superior is not discredited nor against reasonable probability. The erection of the artificial barrier, the Old Fort Road, with culverts between the site and the marina does not remove the site as part

of Lake Superior. As long as lake water would naturally flow to and from the site in the absence of an artificial barrier, it is a part of Lake Superior. The state therefore properly determined the lake's OHWM at "other places on the . . . shore of the same . . . lake" and transferred that finding to the project site. *Diana Shooting Club*, 156 Wis. at 272.

The state claims about half of the site is below 602 feet I.G.L.D. The developers' surveyor, while originally agreeing, later claimed that all of the site was above the 602 feet OHWM. The trial court did not resolve conflicts as to the elevations on the site.

We affirm the court of appeals and therefore remand the case to the trial court for findings as to the various elevations of the project site. Any part of the site at or below 602 feet I.G.L.D. is within the OHWM of Lake Superior and is therefore protected lakebed upon which building is prohibited. Any part of the site above 602 feet is still within the floodplain of Lake Superior and falls within the county's jurisdiction.

The board did not and could not properly grant the developers a floodplain variance as to any part of the site below the OHWM of Lake Superior. Ashland county adopted a floodplain ordinance pursuant to secs. 59.97 and 87.30, Stats. The board may grant a variance only if the grant "will not be contrary to the public interest" and "owing to special conditions, a literal enforcement . . . would result in unnecessary hardship." Ashland County Flood Plain Zoning Ordinance, sec. 7.34 (April 21, 1981); sec. NR 116.21(4), Wis. Adm. Code (1986). Also, a variance "[s]hall be consistent with the spirit and intent of this . . . ordinance" and shall not be granted "solely on the basis of economic gain or loss" nor for "a self-created hardship." Ashland County Flood Plain Zoning Ordinance, sec. 7.34(a), (g) and (h) (1981); Wis. Adm. Code NR 116.21(4) (1986).

The board neglected making any findings as to whether the proposed project will be contrary to the public interest, whether the site has a special condition, and whether this special condition would result in unnecessary hardship. The board also failed to find

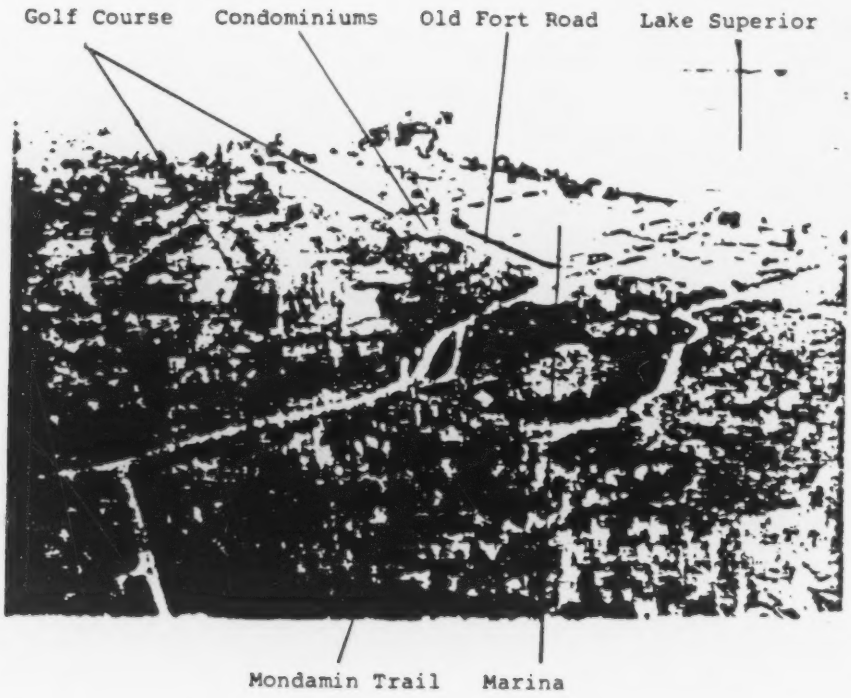
whether the variance would be granted solely for an economic gain or loss and whether there is a self-created hardship.

We remand the case to the circuit court with directions to remand the matter to the board of adjustment for findings concerning those portions of the site higher than 602 feet, the OHWM of Lake Superior. The board must make appropriate findings supporting its conclusion so a meaningful judicial review is possible. *See State ex rel. Ruthenberg v. Annuity & Pension Bd.*, 89 Wis. 2d 463, 478, 278 N.W.2d 835, 842 (1979). The board is required to include findings on public interest, special conditions and unnecessary hardships as well as any of the relevant eight factors set out in sec. 7.34 of the Ashland County Flood Plain Zoning Ordinance. To be considered also is the Ashland county ordinance requirement for a 75 foot set-back from the lakebed as found by the trial court.

The decision of the court of appeals is affirmed and the case is remanded to the trial court for fact-finding consistent with this opinion for findings as to that portion of the site found by the trial court to be above 602 feet I.G.L.D.

By the Court: The decision of the court of appeals is affirmed.

Exhibit 1



From The Office Of:

Marilyn L. Graves
Office of the Clerk
Supreme Court
State of Wisconsin

July 29, 1987

The Court today announced an order in your case as follows:

#85-0818 State v. Thomas D. Trudeau, et al.
Motion for reconsideration is denied, with costs.

J. Abrahamson and J. William A. Bablitch did not participate.

APPENDIX B

No. 85-0818

STATE OF WISCONSIN IN COURT OF APPEALS

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

THOMAS D. TRUDEAU,
TRUDEAU DEVELOPMENT, INC.,
TRUDEAU CONSTRUCTION, INC.,
SUPERIOR DEVELOPMENT, INC.,
THE ASHLAND COUNTY BOARD OF ADJUSTMENT,
LARRY HILDEBRANDT,
ASHLAND COUNTY ZONING ADMINISTRATOR,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Ashland county: WILLIAM E. CHASE, Judge. *Reversed and cause remanded with directions.*

Before Cane, P.J., Dean and LaRocque, JJ.

LaROCQUE, J. The state appeals the dismissal of its action seeking injunctive relief against Thomas Trudeau, Trudeau Development, Inc., Trudeau Construction, Inc., Superior Development, Inc. (Trudeau), and the Ashland County Board of Adjustment. The state argues that Trudeau erected condominiums on the lake bed of Lake Superior contrary to sec. 30.12(1), Stats.,[1] and that the board improperly granted Trudeau a floodplain zoning

variance to construct the condominiums. We conclude that physical facts established by positive, uncontradicted evidence demonstrate the project site is naturally connected to Lake Superior and that if any part of the site is at or below 602 feet I.G.L.D.[2] of the lake's ordinary high-water mark (OHWM), it is part of Lake Superior. Therefore, that part of the judgment concluding that the condominiums do not rest on the Lake Superior lake bed is reversed and remanded for findings by the trial court of the site's elevations. That part of the judgment affirming the board is also reversed and remanded for further proceedings consistent with this opinion.

The subjects of this controversy are six condominium units, erected by Trudeau on Madeline Island as part of a planned development. Old Fort Road lies between the building site and Madeline Island Marina, which is a part of Lake Superior. Water on the site is as deep as 1.2 feet, much of it covered with wetland vegetation, and is connected to the marina by at least two culverts running under the road. The condominiums have been built on stilt-like pilings above the water.

The marina and Old Fort Road were constructed in approximately 1964. The marina was constructed by enlarging a small basin of Lake Superior. This basin was originally bisected by a road with a bridge, but they were removed when the marina was constructed. Old Fort Road was then constructed to the east of the marina, with the culverts placed beneath the road connecting the project and the marina.

The DNR advised Trudeau after meeting with him in November, 1983, that the site was poor for building because of its low elevation, presence of standing water, and wetlands quality, and recommended that he build on an upland site. Trudeau ignored this advice and began construction. Thereafter, he applied to the board for a variance from the floodplain zoning requirement that the condominiums rest on solid fill. The board granted the variance, and Trudeau then finished building the six units. In August, 1984, the state initiated this action against both Trudeau and the board.

The trial court made an error of law when it assumed that the site itself had to be navigable in fact in order to be considered Lake Superior lake bed. The state holds in public trust "[t]he title to the beds of all lakes . . . up to the line of ordinary high-water mark . . . " *Illinois Steel Co. v. Bilot*, 100 Wis. 418, 425, 84 N.W. 855, 856 (1901). The state regulates navigable waters through sec. 30.12(1). Lake Superior is obviously navigable water, sec. 144.26(2)(d), Stats., and the initial question therefore is whether some or all of the project site is within Lake Superior's OHWM, not whether it is navigable.

OHWM is defined as "the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic." *Diana Shooting Club v. Husting*, 156 Wis. 261, 272, 145 N.W. 816, 820 (1914). In the event it is impossible to determine the OHWM at a particular place on the shore, "recourse may be had to other places on the . . . shore of the same . . . lake to determine whether a given stage of water is above or below [OHWM]." *Id.* The actual navigable quality of a section of water matters little as long as it falls within the OHWM of a navigable lake. *Houslet v. State*, 110 Wis. 2d 280, 287, 329 N.W.2d 219, 223 (Ct. App. 1982). "It may be deep or shallow, clear or covered with acquatic vegetation." *Diana Shooting Club*, 156 Wis. at 272, 145 N.W. at 820.

The trial court failed to make OHWM findings, but the state presented evidence establishing Lake Superior's and the site's OHWM. The DNR's area water management specialist testified that he determined the lake's OHWM approximately one-half mile from the site at a protected location with a clear erosion line that was free from excessive wave action. Richard Knitter, DNR engineer, then determined that this site's elevation was 602 feet I.G.L.D. Knitter transferred the elevation of the OHWM site to a number of points at the project site and concluded that approximately half of the site was below Lake Superior's OHWM. Trudeau's surveyor did not determine the OHWM of the site or Lake Superior. He testified that because the site had no discernible waterline or erosion line, its OHWM could not be determined.

Trudeau now argues that the site is not a part of nor connected to Lake Superior, and therefore the lake's OHWM cannot be applied to it.

The trial court, although it did not make a formal finding whether the site was hydraulically connected to Lake Superior, made this observation: "sometimes water goes into the culvert . . . from the marina onto the project property and sometimes it flows out from the project property . . . " Knitter testified that the project was originally part of the basin, which was enlarged to become the present-day marina. He drew this conclusion by studying several aerial photographs of the site as it existed in 1939 and 1950, the original government survey maps, and the site's present configuration. He also studied stereo photographs, which offered a three-dimensional view of the site and the ability to determine elevation. Trudeau's expert did not directly refute this evidence. He merely concluded that on the original 1854 plat of the site's township, there was no "indentation of Lake Superior across Lot 31 or . . . Lot 2 . . . " The marina entrance and the original basin lie where those lots used to be. Testimony contrary to physical facts unquestionably established must give way to the physical facts. *Pappas v. Jack O.A. Nelsen Agency, Inc.*, 81 Wis. 2d 363, 260 N.W.2d 721, 724 (1978).

Where there is positive, uncontradicted testimony as to the existence of some fact, a court cannot disregard that evidence in the absence of something in the case that discredits the testimony or renders it against the reasonable probabilities. *Thiel v. Damrau*, 268 Wis. 76, 85, 66 N.W.2d 747, 752 (1954).

Knitter's positive, uncontradicted evidence that the OHWM of Lake Superior is 602 feet I.G.L.D. and that the project site was and is hydraulically connected to, and is in fact a part of, Lake Superior is not in any way discredited nor against reasonable probability. The erection of the artificial barrier (Old Fort Road) with culverts between the site and the marina does not remove the site as part of Lake Superior. As long as lake water naturally flows to and from the site, it is a part of Lake Superior. Contrary to Trudeau's assertions, the state therefore properly determined the

lake's OHWM at "other places on the . . . shore of the same . . . lake" and transferred that finding to the project site. *Diana Shooting Club*, 156 Wis. 2d at 272, 145 N.W.2d at 820.

The trial court did not resolve conflicts as to the elevations on the site. The state claimed that about half of the site was below 602 feet I.G.L.D. Trudeau's surveyor, while originally agreeing, later claimed that all of the site was above the 602 feet OHWM.

We therefore remand for findings as to various elevations on the project site. Any part of the site at or below 602 feet I.G.L.D. is within the OHWM of Lake Superior and is therefore protected lake bed upon which building is prohibited. Any part of the site above 602 feet is still within the floodplain of Lake Superior and falls within the county's jurisdiction.[3]

The second issue is therefore whether the board properly granted Trudeau a floodplain variance as to that part of the site above the OHWM of Lake Superior. We conclude that it did not.

Ashland County adopted a floodplain zoning ordinance pursuant to secs. 59.97 and 87.30, Stats. In order to construct the six units, Trudeau was required to obtain a variance from the requirement that floodplain structures rest on solid fill. The board may grant a variance only if the grant "will not be contrary to the public interest" and "owing to special conditions, a literal enforcement . . . would result in unnecessary hardship." Ashland County, Wis., Flood Plain Zoning Ord. § 7.34 (April 21, 1981); Wis. Admin. Code § NR 116.21(4) (1986). Also, a variance "shall be consistent with the spirit and intent of the ordinance" and shall not be granted "solely on the basis of economic gain or loss" nor for "a self-created hardship." Ashland County, Wis., Flood Plain Zoning Ord. § 7.34(a), (g), and (h) (1981); Wis. Admin. Code NR 116.21(4) (1986).

The board failed to make any findings as to whether the proposed project will be contrary to the public interest, whether the site has a special condition, and whether this special condition would result in unnecessary hardship. Moreover, the board failed to find

whether the variance would be granted solely for an economic gain or loss and whether there is a self-created hardship.

We conclude that the board must make findings supporting its conclusion so there can be a meaningful judicial review. *See State ex rel. Ruthenberg v. Annuity & Pension Board*, 89 Wis. 2d 463, 478, 278 N.W.2d 835, 842 (1979). We therefore remand the matter to the circuit court with directions to remand the matter to the board to make appropriate findings. The board must include findings on public interest, special conditions, and unnecessary hardships, as well as any of the relevant eight factors set out in § 7.34.

Finally, Trudeau argues that the state's exclusive means of appeal was sec. 59.99(10), Stats., which provides for certiorari review of a board decision within thirty days. We conclude that sec. 87.30(2), Stats., provides the state with an alternative remedy.

Section 87.30(2) deals specifically with floodplain zoning and allows the state to sue to enforce a zoning ordinance adopted under sec. 59.97 under which Ashland County's Flood Plain Ordinance was adopted. Section 59.99(10), on the other hand, sets out specific procedures for boards of adjustment, including certiorari review. Therefore, both statutes, on their faces, give the state power to challenge the board's actions, and both deal generally with the same subject matter.

Statutory construction is a question of law that this court reviews independently on appeal. *Wisconsin Department of Revenue v. Milwaukee Brewers Baseball Club*, 111 Wis. 2d 571, 577, 331 N.W.2d 383, 386 (1983). In construing a statute relating to a particular subject matter, related statutes should be interpreted so as to give effect to each provision of the statutes involved. *Estate of Fucela*, 26 Wis. 2d 476, 480, 132 N.W.2d 553, 556 (1965). To allow the state only to proceed under sec. 59.99(10) would render sec. 87.30(2) meaningless. The state would be confined to a certiorari review even though sec. 87.30 specifically authorizes it to enforce floodplain zoning ordinances. This is not a result the legislature could have intended.

We reverse the judgment for the purpose of fact finding consistent with this opinion and for further remand to the board of adjustment for findings as to that portion of the site found by the trial court to be above 602 feet I.G.L.D.

By the Court. — Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.

APPENDIX

1. Section 30.12(1), Stats., provides in part:

> (1) General prohibition. Except as provided under sub. (4), unless a permit has been granted by the department . . . it is unlawful:
>
> (a) . . . to place any structure upon the bed of any navigable water where no bulkhead line has been established; or
>
> (b) . . . to place any structure upon the bed of any navigable water beyond a lawfully established bulkhead line.

2. I.G.L.D. is an abbreviation for International Great Lakes Datum, a reference system used for expressing elevations in the Great Lakes area.

3. Trudeau also argues that he is entitled to the land because of reliction. Relicted land is land uncovered as a body of water gradually recedes. *Perpignani v. Vonasek*, No. 84-2445 slip op. app. n. 2 (Wis. Ct. App. Feb. 25, 1986). The law of reliction has no application in this case because land cannot at the same time be a lake bed and relicted land. Relicted land is the antithesis of a lake bed.

APPENDIX C

CIRCUIT COURT

STATE OF WISCONSIN	ASHLAND COUNTY
STATE OF WISCONSIN, Plaintiff, v. THOMAS D. TRUDEAU; TRUDEAU DEVELOPMENT, INC.; TRUDEAU CONSTRUCTION, INC.; SUPERIOR DEVELOPMENT, INC.; ASHLAND COUNTY BOARD OF ADJUSTMENT; CAREY HILDEBRANDT, ASHLAND COUNTY ZONING ADMINISTRATOR, Defendants	Case No. 84 CV 8103 MEMORANDUM OPINION AND ORDER

Pursuant to the statement of plaintiff in its first post-trial brief at page 4, the claim against Trudeau Construction, Inc. is dismissed.

Plaintiff has five causes of action in its amended complaint against the remaining defendants. It alleges: (1) that the County should not have issued a land use permit because defendants' condominium project was not approvable under the Amendatory County Zoning Ordinance, Sec. 15.4 by reason that the current U.S. Geological Survey Quadrangle map for Bayfield describes the land on which the project is to be situated as swamps and marshes. The ordinance alleged to be violated is commonly known as the

Shoreland Zoning Ordinance. In summary, plaintiff alleges that the County Zoning Administrator was in error when he designated the area a General Purpose District instead of a Conservancy District. The complaint further alleges that the project is a public nuisance pursuant to Secs. 87.30 (2), 59.971 (2) and 59.971 (7) Stats.

(2) The variance granted defendants to obviate the fill and flood requirements of Sec. 4.42 of the County Flood Plain Ordinance should not have been granted because the County Board of Adjustment did not make a finding that literal enforcement of the ordinance would result in an unnecessary hardship, or a finding that the variance was not contrary to the public interest, as required by Sec. 7.34 of the Ordinance and Sec. 59.99 (7) (c) Stats. The complaint alleges that pursuant to Sec. 87.30 (2) Stats. and Sec. NR 116.22 (4) (d) Administrative Code the project is a public nuisance.

(3) The land on which the project is and may be constructed is below the ordinary high water mark (i.e. the lake bed) of Lake Superior, a navigable water, and there are areas where no bulk head line has been established, and defendants have no permit from the DNR pursuant to Sec. 30.12 Stats.

Cause of action (4) is substantially the same as alleged in cause of action (3).

(5) All of the planned project is and will be, if completed, less than seventy-five feet from the normal high water elevation of Lake Superior contrary to Sec. 3.1 of the Amendatory Zoning Ordinance of the County.

The ad damnen clause contains the relief asked by plaintiff if it prevails on the merits.

We will discuss and rule on the causes of action, starting with causes (3), (4) and (5).

Cause of Action (3). The claim is that the project land is below the ordinary high water mark of Lake Superior as defined in *Diana Shooting Club vs. Husting*, 156 Wis. 261 (1914), at page 272:

> " . . . By ordinary high water mark is meant on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic . . . And where the bank or shore at any particular place is such that it is impossible or difficult to ascertain where the point of ordinary high water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high water mark."

The Court finds on the evidence in this case that there is no distinct mark on the project property, other than perhaps some aquatic vegetation growing thereon, where it could possibly be said that the test could be met in any way. One of the reasons for this is the construction of Old Fort Road with government approval which creates an artificial barrier between the project site and the marina, which is part of Lake Superior, a navigable water. The project is connected to Lake Superior by a culvert under Old Fort Road and possibly one under Mondamin Trail. The Court is satisfied that the issue in cause of action (3) must be decided on the sufficiency or insufficiency of the hydraulic connection between the project site and the marina because if the project site is not part of Lake Superior no permit from the State is required.NOTE (1) The Court feels this is important because there is a lot of land, at least in Northern Wisconsin, that may be below the ordinary high water mark of a navigable stream or lake but is separated therefrom by a hill or other barrier and could hardly be classified as a navigable water or part thereof. Even if it had some aquatic vegetation on it the project site is located on a spot where at least presently no one can boat on it; no one can fish on it; and there was no evidence submitted that anyone did or could hunt on it or travel on it for recreation as an incident to navigation. There was no evidence in the case that the public has any use for this land, let alone recreational, and none was claimed other than ownership, the purpose of ownership being unknown.

In *Doemel vs. Jantz*, 180 Wis. 225 (1923) it was said with approval that a riparian owner is entitled to the land formed by gradual accretions and as a result of reliction. Reliction is defined in law as land left uncovered by the recession of the sea or other water (Webster's New Twentieth Century Dictionary, 2nd ed., 1960). The evidence in the case is clear that sometimes water goes into the culvert under Old Fort Road from the marina onto the project property and sometimes it flows out from the project property, but never to an extent that the public could use the project land as an incident to navigation as defined in the *Doemel* case at pages 229-30.NOTE (2) The Court is satisfied that if there ever was a hydraulic connection between the project site and Lake Superior it has receded to such a point that the State as trustee for the public has no interest in the project site land. It should be pointed out further that, even if the vegetation test was the sole test used here, there was evidence of substantial terrestrial vegetation on the site such as birch trees, etc. as distinguished from aquatic vegetation. Plaintiff's cause of action (3) is dismissed based upon its failure to prove that the project land is navigable under Wisconsin Law.

Cause of Action (4): Plaintiff's cause of action (4) relating to constructing parking lots is dismissed for the same reasons specified in cause of action (3).

Cause of Action (5): is dismissed because the Court having found adversely to plaintiff on causes of action (3) and (4) it follows that the project site is set back a minimum distance of 75 feet from the normal high water elevation of Lake Superior, that being on the marina side of Old Fort Road.

Cause of Action (1): relates to plaintiff's claim that the County should not have issued a land use permit for the project because the Zoning Administrator was in error when he designated the project site General Purpose instead of Conservancy under the County's Shoreline Zoning Ordinance. Pursuant to Sec. 2.2 of the ordinance the Zoning Administrator is to decide the location of the district boundaries subject to appeal under Sec. 13.0 of the ordinance. Plaintiff never appealed under the ordinance, but has brought this action instead. The Zoning Administrator determin-

ed that the project was in the General Purpose District because the official Shoreland Zoning map did not designate it as swamp or marsh.NOTE (3) As a separate ground he determined that the Town's Ordinance, which permitted the project, was more restrictive than the County's Ordinance, and thus the County's Ordinance did not apply in any event. The Court finds that the Zoning Administrator's decision was not arbitrary or capricious, and that his decision is supported by the evidence. Plaintiff's cause of action (1) is dismissed.

Cause of Action (2): This relates to the variance granted by the Board of Adjustment to defendant from the County's Flood Plain Ordinance granting defendant the right to use pilings instead of fill in constructing the project. The Zoning Administrator found that the project site was in the flood plain as defined by the Ashland County Ordinance, and defendants applied for and were granted a variance. The variance was granted by the Board after a full hearing, at which the DNR was present. The Court is satisfied from the minutes of the Board that it was aware of the applicable law and criteria necessary for it to make its decision. Though the minutes of the Board do not disclose that the magic words such as "not due to a self-created hardship" were used in the Board's decision, the Court is satisfied that it was aware of all of the necessary criteria and its decision by implication was based on all the relevant criteria. Cause of action (2) is dismissed.

NOTE (1): Both sides concede that arguments of I.G.L.D. are necessary only for purposes such as determining compliance with the Flood Plain Zoning Ordinance and are not relevant to the ordinary high water mark issue.

NOTE (2): Inasmuch as the rule of reliction applies it is not necessary to determine what the project land was or was not in the past under the facts of this case.

NOTE (3): The State has proven that the map used by the Zoning Administrator was not approved by the DNR. The Court finds, however, that if he had used the map suggested by the DNR, his decision would nevertheless be not arbitrary.

NOTE (4): Defendants' motion to amend answer in paragraph 13 to Sec. 59.99 (10) Stats. is granted.

NOTE (5): Plaintiff has dropped its claim for the assessment of forefeiture for at least existing alleged violations. See page 14 of its post-trial reply brief.

NOTE (6): The Court has not decided the question concerning whether the State could or has timely appealed the determinations of the Board of Adjustment and the Zoning Administrator because it has decided the case on the merits.

ORDER

Plaintiff's complaint is dismissed, and the Clerk is to enter judgment accordingly.

Dated this 4th day of March, 1985.

BY THE COURT

William E. Chase
Circuit Judge

CC:

Mr. Matthew Anich, District Attorney
Mr. Thomas Dosch, Assistant Attorney General
Mr. Ronald E. Martell, Attorney
Mr. Chris Kabella, Attorney
Mr. Richard Wartman, Attorney

CIRCUIT COURT

STATE OF WISCONSIN	ASHLAND COUNTY
STATE OF WISCONSIN, Plaintiff, v. THOMAS D. TRUDEAU; TRUDEAU DEVELOPMENT, INC.; TRUDEAU CONSTRUCTION, INC.; SUPERIOR DEVELOPMENT, INC.; THE ASHLAND COUNTY BOARD OF ADJUSTMENT; LARRY HILDEBRANDT, ASHLAND COUNTY ZONING ADMINISTRATOR, Defendants.	COURT FILE NO. 84 CV 8103 FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

The Court, having made its Memorandum Opinion dated March 4, 1985, makes these findings of fact:

1. That the Court's Memorandum Opinion, including the footnotes, are the Findings of Fact and Conclusions of Law of the Court, and in addition and supplemental thereto the Court finds:

A. There was no evidence that the two culverts connecting Lake Superior with the project property were above, below, or at the same level with the OHWM of Lake Superior, and, absent such evidence, the presence of those two culverts does not establish an

hydraulic connection with the same OHWM as Lake Superior to explain why water sometimes flows in and sometimes out of the culverts. If the culvert was above or below the OHWM it would not explain where the water came from on the project property in relation to the OHWM. Plaintiff has not met its burden of proof concerning the height and sufficiency of the hydraulic connection. Absent such evidence the OHWM of Lake Superior becomes meaningless.

B. A public hearing was held on January 13, 1984, and as a result thereof defendants were granted a variance from the Ashland County Flood Plain Ordinance, from which the State, an interested party, did not apply for a Writ of Certiorari within 30 days of the filing of the decision with the board, as required by Sec. 59.99 (10) Stats., and it cannot in the case at bar raise the issue of alleged improper granting of the variance in any event.NOTE (1)

CONCLUSIONS OF LAW

Plaintiff's complaint is dismissed with prejudice and without costs, and the Clerk is to enter judgment accordingly.

NOTE (1): See 57 Marquette Law Review 25 for an article dealing with notices to the DNR under the Shoreland Zoning and other acts. The Court is now satisfied, as it wasn't when it wrote its March 4, 1985 opinion, that the State in the case at bar was an aggrieved party as defined in Sec. 59.99 (10) Stats. and should have timely appealed.

NOTE (2): No costs are allowed because there is no statutory authority for them. Defendants' case citations rely on statutes not applicable to the case at bar.

Dated this 11th day of April 1985.

BY THE COURT

William E. Chase
Circuit Judge

CC:

Mr. Thomas Dosch, Assistant Attorney General
Wisconsin Department of Justice
P.O. Box 7857
Madison, Wisconsin 53707-7857

Mr. Ronald Martell, Attorney
Moore, Costello & Hart
1400 Norwest Center
55 East Fifth Street
St. Paul, Minnesota 55101

Mr. Richard Wartman, Attorney
Wartman, Wartman & Dallenbach
220 Sixth Avenue West
Ashland, Wisconsin 54806

Mr. Matthew Anich, District Attorney
Court House
Ashland, Wisconsin 54806

CIRCUIT COURT
STATE OF WISCONSIN ASHLAND COUNTY

State of Wisconsin,

Plaintiff,

vs.

Thomas D. Trudeau; Trudeau Development, Inc.; Trudeau Construction, Inc.; Superior Development, Inc.; the Ashland County Board of Adjustment; Larry Hildebrandt, Ashland County Zoning Administrator,

Defendants.

COURT FILE NO. 84CV8103

JUDGMENT

Based upon the foregoing Order for Judgment, it is hereby decreed that a Judgment in the above-captioned matter be docketed, entered, and filed with the Ashland County Clerk of Court adjudging:

1. That Plaintiff's Complaint is dismissed in its entirety against all Defendants, with prejudice.

~~2. That the Defendants have and recover~~ WEC
~~$_____ as its costs allowed by law.~~ AF

3. That the Notice of Lis Pendens and Amended Notice of Lis Pendens filed against the Project property is discharged.

BY THE COURT:

Dated: **April 11, 1985**

William E. Chase
The Honorable William E. Chase
Circuit Judge

APPENDIX D

include contentions as to what evidence is properly before the court for consideration.

II. THE PLAINTIFF'S SEC. 30.12, STATS., CLAIMS AGAINST THE DEFENDANT REAL ESTATE DEVELOPERS.

A. *The Relevant Law.*

The third and fourth claims of the plaintiff's amended complaint allege that the defendants Superior Development, Trudeau Construction, Trudeau Development and Thomas Trudeau have committed violations of sec. 30.12, Stats., by building condominiums and a parking facility on the bed of Lake Superior. That statute reads, in relevant part:

> (1) GENERAL PROHIBITION. Except as provided under sub. (4), unless a permit has been granted by the department pursuant to statute or the legislature has otherwise authorized structures or deposits in navigable waters, it is unlawful:
>
> (a) To deposit any material or to place any structure upon the bed of any navigable water where no bulkhead line has been established; or
>
> (b) To deposit any material or to place any structure upon the bed of any navigable water beyond a lawfully established bulkhead line.

Section 30.15(4), Stats., further authorizes this court to make such orders as are appropriate to eliminate structures which violate sec. 30.12, Stats.:

> OBSTRUCTIONS ARE PUBLIC NUISANCES. Every obstruction constructed or maintained in or over any navigable waters of this state in violation of this chapter and every violation of s. 30.12 or 30.13 is declared to

> be a public nuisance, and the construction thereof may be enjoined and the maintenance thereof may be abated by action at the suit of the state or any citizen thereof.

The relief sought by the plaintiff in this case is the removal of those structures (*i.e.*, condominiums or parking facilities) which lie on ground below the ordinary high water mark of Lake Superior and an injunction prohibiting further construction on such lands. Although the amended complaint contains a request for the imposition of forfeitures, the plaintiff will not request such a penalty at this time, but will pursue the collection of forfeitures only for any future violations by these defendants.[1] Before turning to the particular facts of this case, the law regarding ownership and control of Wisconsin's lakebeds will be discussed.

Section 30.12 and chapter 30, Stats., generally speaking, codify or reflect a number of common law doctrines regarding the ownership of the beds of navigable waters. It has long been established, indeed to the point of being "too well settled to warrant any discussion: by the Wisconsin Supreme Court, that:

> The title to the beds of all lakes and ponds, and of rivers navigable in fact as well, *up to the line of ordinary high-water mark*, within the boundaries of the state, became vested in it at the instant of its admission into the Union, in trust to hold the same so as to preserve to the people forever the enjoyment of the waters of such lakes, ponds, and rivers, to the same extent that the public are entitled to enjoy tidal waters at the common law.

Illinois Steel Co. v. Bilot and wife, 109 Wis. 418, 425, 84 N.W. 855 (1901) (emphasis added). *See also State v. McDonald Lumber Co.*, 18 Wis. 2d 173, 176, 118 N.W.2d 152 (1962). This is as true of the beds of the Great Lakes as it is of lesser inland waters. *Ibid.* An informative historical background of this public trust is found

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[1]The plaintiff concedes that, based on the pleadings, the defendants' Answers to Interrogatories and the evidence at trial, that the plaintiff's claims against Trudeau Construction, Inc., may be dismissed.

in the landmark case of *Muench v. Public Service Comm.*, 261 Wis. 492, 53 N.W.2d 514 (1952), where the court noted:

> At an early date in its history the Wisconsin court put itself on record as favoring the trust doctrine, that the state holds the beds underlying navigable waters in trust for all of its citizens, subject only to the qualification that a riparian owner on the bank of a navigable stream has a qualified title in the stream bed to the center thereof.

261 Wis. at 501-02. Title to lake beds passed to the state upon statehood. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 230 (1845). Section 30.12, Stats., which the plaintiff has asked this court to enforce against the defendant real estate developers, is a codification of the common law restriction against encroachments on publicly held lakebeds. *See Hixon v. Public Service Comm.*, 32 Wis. 2d 608, 616, 146 N.W.2d 577 (1966).

The definition of what constitutes the ordinary high-water mark of a lake, which demarcates the state-owned lakebed from the upland capable of private ownership, is similarly well-established in the law. In the case of *Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816 (1914), in which the court examined the ownership of a bay area which was navigable in fact only part of each year and which contained vegetation four to five feet above the water's surface, the court observed:

> By ordinary high-water mark is meant the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. *Lawrence v. American W.P. Co.* 144 Wis. 556, 562, 128 N.W. 440. And where the bank or shore at any particular place is of such a character that it is impossible or difficult to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark.

156 Wis. at 272. For purposes of determining the extent of control of the public trust "it is immaterial what the character of the stream or water is. It may be deep or shallow, clear or covered with aquatic vegetation." *Ibid.* Judicial recognition of state title to land below waters that are not continuously navigable continues to the present day:

> [T]he public interest in and title to the navigable waters in this state attaches to more than the open and perpetually navigable waters contained in lakes, rivers and streams. It extends to areas covered with aquatic vegetation within the ordinary high water mark of the body of water in question.

Houslet v. Natural Resources Department, 110 Wis. 2d 280, 287, 329 N.W.2d 219 (1982). Public ownership of the bed applies whether the water is deep or shallow, whether the bed is a sandbar in an otherwise navigable channel or whether it is shoal water next to the bank. *Diedrich v. The N.W.U.R'y* Co., 42 Wis. 248, 266 (1877).

As may be apparent from a reading of the foregoing rule which defines the extent of state ownership of lake beds, Wisconsin law recognizes that the boundaries of a riparian's property (*i.e.*, property along a navigable body of water) may change over time through certain physical processes such as accretion, reliction, erosion or avulsion. *See, e.g., Baldwin v. Anderson*, 40 Wis. 2d 33, 161 N.W.2d 553 (1968). Indeed, some authorities take the position that a rule of law involving fixed, rather than ambulatory, boundaries, would be unconstitutional. *Land and Water L. Rev.*, Vol. XIII, No. 2 (1978) at 465.

Before turning to the evidence in this case, or the law applicable to the affirmative defenses asserted by the defendants, one other aspect of sec. 30.12, Stats., will be discussed in general terms. That issue concerns the element of the offense involving "bulkhead lines." In the case of *State v. McFarren*, 62 Wis. 2d 492, 497-99, 215 N.W.2d 459 (1974), the Supreme Court described what a "bulkhead line" is within the meaning of that statute. The court distinguished the legal definition of bulkhead line from the concepts of the natural

shoreline and from either the low or high-water marks on the shore. In the words of the court, "a bulkhead line . . . is a line legislatively established by a municipality which may differ from the existing shoreline." 62 Wis. 2d at 498. Prior to becoming effective, a bulkhead line must be approved by the Wisconsin Department of Natural Resources. The procedure for establishing a bulkhead line is expressed in sec. 30.11, Stats.

B. *The evidence that the defendant real estate developers have violated sec. 30.12, Stats.*

The elements of proof necessary to demonstrate a violation of sec. 30.12(1), Stats., where, as here, there is no bulkhead line, are as follows:

1. the placement of a structure or deposit of any material;

2. upon the bed (*i.e.*, below the ordinary high-water mark) of a navigable body of water;

3. in an area where no bulkhead line has been established; and

4. without a permit from the DNR authorizing such action.

A review of the clear, satisfactory and convincing evidence in this case shows, to a reasonable certainty, that every element of this offense has been proven in this case.

Three of the four elements of this offense are essentially undisputed. The absence of a sec. 30.12, Stats., permit was admitted to by the defendants in paragraph 8 of their Amended Answer. The absence of a sec. 30.12 permit was also established by Exhibit 23, the affidavit by the custodian of DNR records that no such permit was on file with the DNR, and by the testimony of Richard Knitter that his search of DNR records indicated that no sec. 30.12 permit had been issued by the DNR for the Marina Point Condominiums project. Exhibit 23 and the testimony of Richard Knitter similarly established, by unrebutted evidence, that no sec. 30.11, Stats., bulkhead line has ever been established in the vicinity of

the defendants' project.[2] The other undisputed element of this offense is the existence of certain structures (Condominium Cluster "A") and the deposit of materials (the parking lot). Both are shown in the numerous photographic exhibits (*see, e.g.*, Exhibits 5 and 6) and on the real estate developers' own survey (Exhibit 83). The only real dispute between the parties with respect to whether or not a violation of sec. 30.12, Stats., has been established concerns the location of the ordinary high-water mark (OHWM) of Lake Superior in the vicinity of the Marina Point Condominiums project. If the structures and deposits were placed below the OHWM, a violation clearly exists; if they were placed inland from the OHWM, then no violation of the statute has yet taken place.[3] Before discussing whether or not portions of this particular property are above or below the OHWM of Lake Superior, however, several general comments about surveying and ordinary high water marks are in order.

As the state's surveyor, Mr. Richard Knitter, testified, it is possible for the elevation of a particular point to be expressed in terms of either an arbitrary numbering system or in terms of some established data system, or "datum," which employs certain conventions and specific values for particular points. Both the plaintiff's and the defendants' surveyors made reference to a number of datums: I.G.L.D. (International Great Lakes Datum), M.S.L. and N.G.V.D., among others. As Mr. Knitter testified, however, and

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[2]The only attempt by the defendants to refute the nonexistence of a bulkhead line was some questioning by defense counsel, Mr. Martell, objected to by counsel for the plaintiff as irrelevant, which was intended to establish that the road between the project site and the Marina might function in fact as a "bulkhead." The plaintiff's objection was based on the proposition that only a legally established "bulkhead line" had any relevance to this case. *See* the discussion of the *McFarren* case, *supra*. Moreover, the testimony elicited from the witness (Richard Knitter) by defense counsel was that the road did *not* in fact act as a bulkhead or dam.

[3]It should be remembered that the defendants contemplate developing the remaining portions of the land described in Exhibit 1, much of which, according to the testimony of the state's surveyor, Richard Knitter, and as shown by defense Exhibits 82 and 83, is lower than the portion already developed.

as William Shearman, the defendants' surveyor agreed,[4] it is not necessary to employ any particular datum to determine an OHWM or to compare the relative elevations of surrounding lands with the OHWM thus established. The use of a particular datum would be required, for purposes relevant to this lawsuit, only for determining compliance with the floodplain zoning ordinance, which is expressed in terms of I.G.L.D. The truth of this proposition was conceded by the defendants' surveyor. Transcript, at 35. Thus, while Mr. Knitter did assign an I.G.L.D. elevation to the OHWM of Lake Superior determined by the DNR, he didn't need to use that data system. Furthermore, regardless of the absolute accuracy of his assumed I.G.L.D. elevation of the OHWM, he could accurately compare the relative elevations of Lake Superior and the land described in Exhibit 1, the project site. Thus, the dispute between the parties as to the accuracy of Knitter's assumed I.G.L.D. elevation of Lake Superior[5] is not relevant to a consideration of whether the Marina Point Condominiums site is above or below the OHWM of Lake Superior. Its importance to the case is limited to a determination of compliance with the Ashland County floodplain zoning ordinance, and more particularly to the question of whether or not the site is located on land below the elevation of the ap-

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[4]When asked if he agreed with the proposition that Mr. Knitter's assumed level of Lake Superior, even if incorrect, need not affect Mr. Knitter's comparison of the relative elevations of the lake and the Marina Point Condominiums site, Mr. Shearman responded: "If he assumed the high water mark in one position, correct." Transcript at 46. *See also* Mr. Shearman's response to the following question on pages 34-35 of the transcript:

> Q. If you wanted to determine whether or not the elevation of a particular piece of land is above the ordinary high water mark, you can start at an arbitrary number and determine whether or not it was higher on the water elevation?
>
> A. Probably, yes.

[5]The defendants' criticism of Mr. Knitter's conclusions as to the I.G.L.D. elevation of Lake Superior are elaborated upon in great detail in both Mr. Shearman's trial testimony and in the defendants' post-trial surrebuttal affidavits.

plicable flood profile elevation. With these general concepts in mind, the evidence produced at trial with respect to the elevation of the OHWM will now be considered.

Mr. Duane Lahti, the DNR's Area Water Management Specialist, a man with a college degree in biology, and a minor in geology, and who has had advance formal education with respect to aquatic plant species, described how he selected a point the elevation of which he believed to represent the OHWM of Lake Superior on Madeline Island. Mr. Lahti described how he applied the factors listed by the Wisconsin Supreme Court in the *Diana Shooting Club* case, *supra,* and he testified that it is sometimes easier to identify the OHWM on some portions of a shore than along others where vegetation may obscure or render indistinct the location of the OHWM. Mr. Lahti described how, on October 25, 1984, he selected a sheltered site within the La Pointe ferry pier harbor for use in making his OHWM determination because the area could not experience excessive wave action, because there was a clear erosion mark on the shore at this site (unlike the Marina Point condominiums site) and because there was a well-defined line of upland or dune-type vegetation at that location. All these factors are readily apparent in the photographs taken of the point selected by Mr. Lahti as the OHWM elevation. *See* Exhibits 14 and 15. His OHWM determination in this case is one of hundreds he has performed in the course of his duties for the DNR.

Mr. Knitter testified that he surveyed the elevation of the point selected by Mr. Lahti as the OHWM and determined the elevation of the point, in conservative terms, to be 602.0' I.G.L.D. This number was based on the assumption, referred to in Mr. Knitter's affidavit and Exhibit 13, that the level of Lake Superior that day was 601.5' I.G.L.D. He then transferred the elevation of the OHWM from the pier area to the marina and compared the elevations of a number of points on the Marina Point Condominiums premises with that of Lake Superior. His conclusions are shown on Exhibit 13, a transparent overlay which demonstrates that a good deal of the property lies below the elevation of the OHWM of Lake Superior. Despite the defendants' contentions to the contrary, it doesn't matter whether or not the elevations generated by Mr. Knitter are accurate in terms of I.G.L.D. elevations. What

matters is the accuracy of his comparison of the elevation of the Marina Point Condominiums site with the elevation of Lake Superior, a task which the defendants, after a great deal of speculation as to conditions they suggest existed on the dates of Mr. Knitter's surveys, leads them to conclude that his assumed lake level in the marina may be off by .2' because the transfer of the assumed lake level from the ferry prior to the marina. Shearman Transcript, at 27. Since many of the points measured on the defendants' premises were 1.5' or more below the OHWM, the defendants' criticisms have very little significance to this case.

The plaintiff does not intend to concede, however, any inaccuracies in the I.G.L.D. elevation assumed by Mr. Knitter in his two surveys. The accuracy of his assumption, and of the conclusions he reached, are confirmed in a number of respects. It should be noted initially that there is a very close corroboration in elevations between Mr. Knitter's work (Exhibit 13) and the survey of Mr. Shearman performed in October, 1983 (Exhibit 82) and the elevations shown in the plans of the defendants' architects (Exhibit 12). The only evidence which contradicts Mr. Knitter's I.G.L.D. elevations is the survey performed by Mr. Shearman the day before trial (Exhibit 83) which contradicts his own survey of the preceding year which was presumably relied upon by the defendants and their architects as a basis for this expensive condominium development project. Again, whether or not Mr. Knitter's site elevations are accurate in terms of this I.G.L.D. system is not critical to determining compliance with sec. 30.12, Stats., for a comparison of the relative elevations of the lake and the the (sic) disputed land, in any conventional or arbitrarily assumed datum, can establish that point. However, a word or two about Mr. Shearman's revisions to his earlier survey are in order.

At some point, perhaps with respect to the floodplain zoning issue, the court may feel a need to choose between the disparate conclusions reached by Mr. Knitter (Exhibit 13) and Mr. Shearman (Exhibit 83) with respect to the I.G.L.D. elevations of various points on the Marina Point Condominiums premises. With respect to the credibility of Mr. Shearman's various conclusions, the following facts should be kept in mind. First, his initial survey (Exhibit 82), prepared ten months prior to the commencement of litigation,

has been corroborated by the DNR's survey; his revisions to that survey, as expressed in Exhibit 83, were performed literally on the eve of trial and are not similarly substantiated. Secondly, Mr. Shearman deliberately revised his initial survey by measuring the elevations of only five points — all corners of the building known as "Cluster A" — and he did nothing to revise the elevations he determined for other points in his earlier survey (Exhibit 82). Third, in neither survey did Mr. Shearman measure the elevation of the land lying between the 602.0' contour lines on his Exhibits 82 and 83; this is the area in which Mr. Knitter found the lowest ground, *i.e.*, there were four points at or below 600.5' I.G.L.D. As Mr. Shearman testified, he didn't take any measurements in that area (Transcript at 32), so his testimony and Exhibit 83 don't even attempt to refute the state's contention that this land is below the OHWM of Lake Superior. Mr. Shearman testified that .8' would have to be added to his initial survey (Exhibit 82) in order to accurately express the elevations in terms of I.G.L.D. (Transcript, at 20). He admitted,[6] however, that he never made a determination of what was the elevation of the Lake Superior OHWM. It is interesting to note that, assuming the need to correct the figures in Exhibit 82 by adding .8' to them, if you similarly add .8' to Mr. Knitter's elevations (which, the court may recall, corresponded closely to Mr. Shearman's initial measurements) you would get an OHWM of 602.8' I.G.L.D. and the land under Cluster A and most of the remainder of the defendants' premises would still be below the defendants' "corrected" OHWM. Instead, the defendants would play a shell game with the court: they accept Mr. Knitter's assumptions of the elevation of the OHWM as 602.0 I.G.L.D. (Shearman Transcript, at 36) but they contend that all his other numbers, *i.e.*, the elevations he found on their land, are .8' too low.

This kind of self-serving algebra should be entitled to no weight, and it suggests a lack of professionalism on Mr. Shearman's part. To establish his expertise in making OHWM determinations (ironically something he ultimately did not do in this case) Mr. Shearman testified as to the statutory obligations of land surveyors for subdivisions abutting waterways. In so doing, however, he in-

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[6]Transcript at 7-8 and 36.

correctly asserted that the law required him to place monuments a minimum of 25 feet back from the OHWM' when the statute, sec. 236.15(1)(a), Stats., specifies a twenty foot setback. Even if Mr. Shearman had correctly understood and characterized his statutory obligations, it is questionable how this duty qualifies him as an expert at OHWM determinations, since it obligates surveyors to approximate (by setting the monument *"not less than"* twenty feet back from the shore) rather than to specify exactly where the shoreline is, as Mr. Knitter and Mr. Lahti have done in this case and as they routinely do in the normal course of their duties.

There is additional corroborating evidence in the record which supports the proposition that the defendants' property is lakebed, *i.e.*, that it lies below the OHWM of Lake Superior and is a part of that body of water. Mr. Knitter testified that on all three of his visits to the site he found standing water, and that the surface elevation of that water was within .04' of the surface elevation of Lake Superior at the same time. (*See* Exhibit 13, where the elevation of the water on the defendants' property was determined to be 601.54' I.G.L.D. when the elevation of the lake was 601.50' I.G.L.D.) The physical connection of the premises to the open waters of Lake Superior will be discussed in some detail later in this brief (section II.C.4, *infra*) but suffice it to say for now that the area is connected by water, with no intervening land above the OHWM, to the main body of Lake Superior. Moreover, Mr. Knitter testified that, on different occasions, he has observed water flowing in both directions through the culvert which connects the defendants' property to the marina, that is to say, sometimes the water flows from the defendants' property into the lake, but on other occasions the water from the lake flows through the culverts onto the defendants' land. Finally, all parties to this case have agreed that the vegetation on the defendants' property is aquatic, not terrestrial, in nature.

Thus, it can be seen that the plaintiffs have proven all the elements of a violation of sec. 30.12, Stats., in this case. There is no lawful bulkhead line in the vicinity of this project and the

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[7]Transcript at 4.

defendants have never obtained a sec. 30.12, Stats., permit for the structures and fill they have placed on the premises. The only evidence as to the elevation of an ordinary high water mark in this case is that supplied by the plaintiff. The defendants' efforts to suggest an inaccuracy in terms of absolute I.G.L.D. elevations are not only unfounded on the facts, but irrelevant to Mr. Knitter's conclusion, based on his comparison of their relative elevations, that most of the defendant developers' land is below the OHWM of Lake Superior and that portions of the property underlying both Cluster A and the parking lot, as indicated by Exhibit 13, are on lakebed. Attention will now focus on the merits of the affirmative defenses asserted by the defendants with respect to the alleged violation of sec. 30.12, Stats.

C. *The defendants' affirmative defenses to the alleged violation of sec. 30.12, Stats.*

Due to the expedited nature of this proceeding, and the fact that there have been no pretrial motions which might have clarified the parties' positions on the legal issues, describing the defendants' affirmative defenses and the evidence relating to those defenses calls for some speculation. Based on the defendants' pleadings, on discussions with opposing counsel and on the evidence produced by the defendants at trial, it appears that the affirmative defenses discussed below are being pursued by the defendant real estate developers. With the exception of the first defense, all of the defendants' defenses to the plaintiff's sec. 30.12, Stats., claims would admit that the land in dispute is lakebed, but deny any liability for violating the statute or any need to remove the fill and structures, on the ground that the state has lost jurisdiction over the property for one reason or another. In the court's consideration of these defenses, it should be remembered that under the law the defendants have the burden of proving the merits of such defenses to the state's lakebed jurisdiction under sec. 30.12, Stats. *State v. Bleck*, 114 Wis. 2d 454, 462, 338 N.W.2d 492 (Sup. Ct. 1983).

1. The defendant developers' contention that there is no OHWM on the Marina Point Condominiums property.

In the course of his trial testimony, Mr. William Shearman, the defendants' surveyor, expressed the surprising opinion that there is no OHWM on the premises of the Marina Point Condominiums project.[8] His opinion in that respect is unusual that he didn't say the land is above the elevation of the OHWM of Lake Superior, nor did he deny that the land is typically submerged by water at essentially the same elevation as the lake (*see*, Exhibit 13), nor did he deny that the premises are connected by water (*i.e.* hydraulically) to the open water of Lake Superior. Instead, his conclusion that none of the property is lakebed appears based on his opinion that there was not any "indication of a shore" in the area[10] and that for an OHWM to exist there has to be both an erosion mark and "some changes in vegetation."[11] It may be that this position is simply a denial of one element of the plaintiff's sec. 30.12 claims rather than an affirmative defense, but since Mr. Shearman's opinions are not only factually confused and internally inconsistent, but also misstate the relevant law, they will be addressed under the heading of affirmative defenses.

Mr. Shearman testified that he would not ever transfer an OHWM elevation from an area along a lakeshore with a distinct OHWM to an area where vegetation has obscured the shoreline.[12] This approach to OHWM determinations is contrary to the law of this state and contradicts both common sense and other aspects of Mr. Shearman's testimony. As noted in the earlier discussion in this brief of the *Diana Shooting Club* case, the Wisconsin Supreme Court has expressly contemplated and approved the transferring of elevations along a lakeshore for the purpose of determining the OHWM in an area of aquatic vegetation:

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[8]Transcript at 24.

[9]*Ibid.* at 24.

[10]*Ibid.* at 37.

[11]*Ibid.* at 38-39.

[12]*Ibid.* at 39.

> And where the bank or shore at any particular place is of such a character that it is impossible or difficult to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark.

156 Wis. at 272. There is a sound practical reason for this rule and Mr. Shearman's testimony gives evidence of the need for such practices. Mr. Shearman admitted that he had observed areas along lake shores where there was no obvious erosion mark,[13] areas where the same aquatic vegetation exists both above and below the elevation of the OHWM[14] and he admitted that the vegetation on the Marina Point Condominiums site is of a wetland type. While he refrained from doing so in his preparation for testifying in this case, he did concede that, to fully advise owners of properties along portions of a lake where the shore is indistinct what the extent of their ownership would be, he would "go to abutting areas and look for features, maybe where the bay exists, that would show a continuous line for a shore line to be generated off of."[15] In so testifying, he tacitly recognized the surveying practice authorized by the Wisconsin Supreme Court in *Diana Shooting Club* and employed by the DNR staff in this case to locate the OHWM of Lake Superior on the defendants' property. The credibility in factual terms of Mr. Shearman's opinion that this property is not lakebed has been touched upon earlier in this brief. From the foregoing discussion, however, it should be clear additionally that he is simply wrong about the law and recognized surveying practices with respect to making OHWM determinations.

2. The legal significance of the 1856 federal patent of the disputed property.

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[13] *Ibid.* at 37.

[14] *Ibid.* at 39.

[15] *Ibid.* at 38.

The court received into evidence, over the plaintiff's relevancy objection,[16] Exhibit 79, the original federal patent of April 1856[17] which purported to convey title to lands including those in dispute here to a private party. Since this conveyance occurred after Wisconsin became a state, it is the plaintiff's position that this patent could not operate to vest title in the lakebed in any entity other than the State of Wisconsin.

Wisconsin became a state on May 29, 1948 (sic). Under the "equal footing" doctrine, pronounced in *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845), a state "receives absolute title to the beds of navigable waterways within its boundaries upon admission to the Union and [the doctrine] contains not the slightest suggestion that such title is 'defeasible' in the technical sense of that term." *State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372 (1977). Furthermore the "absolute title of the states to the beds of navigable waters" could not be subsequently defeated by a patent or "grant from Congress to a third party." *Ibid.*, 429 U.S. at 374. After so acquiring title to the lakebeds on statehood, title to the lands "is not subject to defeasance and state law governs subsequent dispositions." 429 U.S. at 378. Thus, subsequent federal patents to lakebeds (like that of Lake Superior) which Wisconsin acquired in 1848 cannot operate to defeat the state's title to those lands. Similarly, after statehood state common law doctrines, such as those relating to accretion, reliction, erosion and avulsion, apply with respect to riparian properties. Thus, it is not essential that a particular parcel of land now claimed as public lakebed have been part of the bed of a navigable water in 1848, if it since has become part of such a body of water under the state's common law.[18] *See*

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[16]Shearman transcript at 9.

[17]Although the transcript reads "1956," it is the plaintiff's understanding that the actual date of the instrument is 1856.

[18]It is the state's contention that the land in dispute in this case has been part of the bed of Lake Superior at all times relevant to this proceeding and going back in time well before statehood. Strictly speaking, however, proof of the relationship of this land to Lake Superior in 1848 should not be regarded as a necessary element in establishing the state's claim to title to this property.

also, Angelo v. Railroad Commission 194 Wis. 543, 217 N.W. 570 (1928); and *Mendota Club v. Anderson and another,* 101 Wis. 479, 78 N.W. 185 (1899).

That the disputed land is now lakebed has already been established by the preceding arguments in this brief. That the land has been lakebed since statehood will be discussed below. It is undeniable that the patent relied upon by the defendants as the source of their claim in title was issued after statehood. Under the law of this nation and its states, however, it is clear that this patent could not operate to vest title to the lakebed in any entity other than the State of Wisconsin.

3. The relevance of the federal Swamp Land Act to this case.

In his opening argument, counsel for the defendant real estate developers contended that the federal Swamp Land Act of 1855 required the conclusion that this land passed to the patentee and not to the State of Wisconsin. A brief examination of the relevant law and facts shows there is no merit to this affirmative defense.

In the first place, passage of the Swamp Land Act of 1855 followed, by seven years, the admission of Wisconsin into the union of the United States. As of the date of statehood, Wisconsin's claim of title to the lakebed was no longer defeasible by any acts of Congress. *Corvallis,* 429 U.S. at 374, 378. To argue that the Swamp Land Act somehow, in an after-the-fact manner, diverts the state's title to this property is contrary to well-established United States Supreme Court case law. Perhaps the only way the defendants could invoke the provisions of the Act would be if the land were not in fact lakebed, but that situation is not presented to the court in this case.

Secondly, even if the Swamp Land Act of 1855 were applicable to these lakebed lands, there is nothing in the record to suggest that the Act was ever applied to the disputed property. The Swamp Land Act, in its various forms, envisioned a compilation by the various states of specific federally owned lands sought to be covered by the Act. Thereafter, the federal government would approve the

list of swamp lands and transfer fee title to the state, not, as here (Ex. 79, the original Federal Patent), to a a private party. *See* 43 U.S.C. § 982-83. Thus, even if title to the disputed property hadn't already been vested in the state as lakebed in 1848, there is no evidence in the record that the federal Swamp Land Act ever had any application to these lands.

4. The application of the concepts of estoppel, adverse possession, and artificial alteration of navigable waters to this case.

From the defendants' pleading, the opening statement of defense counsel and many of the exhibits introduced by the defendants at trial, it appears that the defendant real estate developers intend to argue that the disputed land, while it may be below the OHWM of Lake Superior, is no longer vested in the plaintiff for a variety of reasons. These defendants would apparently argue that the state is estopped from claiming title to the land, that a continuous chain of private title for nearly 130 years has given them title through adverse possession, and that artificial alterations of the lakebed between their property and the open water of Lake Superior somehow precludes the state from asserting title to the condominiums site. The shortcomings of any attempt to apply those concepts to this case will be demonstrated in the discussion which follows.

As alluded to earlier in this brief,[19] the beds of navigable lakes in this state are held in trust by the state for the public good. The state's obligation to protect its waterways and lakebeds began at statehood and continues as a constitutional limitation on public and private use of navigable waters. *Muench, supra.* As a matter of law, and on the basis of the facts in this case, it is clear that no claim to title on the basis of adverse possession could be made in this case. In the first place, "no prescriptive rights are attainable in the beds of navigable watercourses because of the trust doctrine under which the state manages navigable waters so that all per-

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[19] *See* the discussion of the *Illinois Steel* and *Muench* cases, *supra.*

sons may fish, boat, swim and engage in other recreational activities." 1961 Wis. L. Rev. 47, 67, "Prescriptive Water Rights." *See also* Annotation: Adverse Possession-Public Property, 55 ALR 2d § 15 and the cases cited therein in support of the same proposition. Similarly, if the Legislature cannot affirmatively grant title to lakebeds to private persons for purely private purposes, *Milwaukee v. State*, 193 Wis. 423, 214 N.W. 820 (1927), the law certainly cannot contemplate a loss of title to such land by the state's inaction in the face of adverse possession. Even if the law of Wisconsin did recognize the possibility of acquiring title to lake bed through adverse possession, there is no evidence in the record that these defendants, or anyone else, have openly, notoriously, and in an adverse, uninterrupted and continuous manner, occupied the lakebed for more than twenty years, as the case law and statutes would require. *Green Bay & M. C. Co. v. Telulah P. Co.*, 140 Wis. 417, 122 N.W. 1062 (1909).

At the trial, the defendants went to considerable lengths to demonstrate the construction (and eventual relocation) of Old Fort Road and of the La Pointe Marina, both of which separate the defendants' property from the main body of Lake Superior. Presumably the defendants wish to establish a basis for arguing either that, except for these artificial alterations of the environment, their property would be a discrete, isolated wetland removed from Lake Superior or, in the alternative, that the road so separates their property from Lake Superior that it cannot be regarded as part of the Lake.

With respect to the former argument, it should be remembered that not *all* portions of a lake within the OHWM need to be navigable in order for the entire lakebed to be public property; if that were the case, the pronouncements that title extended to the upward reaches of a beach would be rendered meaningless. Thus, it is irrelevant whether or not a boat could be floated on the defendants' property *if* it is otherwise a part of the bed of Lake Superior, a water body which is undeniably a natural navigable body of water. Additionally, since the defendants' argument in this respect suggests that a portion of Lake Superior which would normally be within the DNR's jurisdiction is outside the scope of the agency's

control because of some exceptional circumstances, the defendants have the burden of proving this exception to state jurisdiction over the property. *Bleck, supra.*

The defendants' contention[20] that the site of their project would be physically and hydraulically removed from the waters of Lake Superior but for the artificial alterations of the area associated with the Marina and road relocation are unsubstantiated by any of the evidence in the case, including their own exhibits. The area in which the Marina Point Condominiums project is being constructed has at all times been immediately adjacent to or part of an inlet from Lake Superior. The plaintiff's historian, Professor Charles Twining, testified that the best source of information relating to the probable outline of the shore in the La Pointe area in the mid-1800's would be the maps generated by Mr. Hamilton Ross, a local historian who did an exhaustive study of La Pointe. The map representing Mr. Ross' conclusions in this respect (Exhibit 40) clearly shows an inlet from Lake Superior extending east of Old Fort Road. Professor Twining elaborated upon his conclusion as to why he believed that this was a natural inlet by explaining that, in all probability, the inlet was the harbor for the forts and other facilities once located in the immediate vicinity of what is now the La Pointe Marina. The defendants' 1854 plat map (Exhibit 81) also shows an inlet from Lake Superior extending east of Old Fort Road and through lots 38 and 39, which the defendants' own surveyor identified[21] as the present site of the La Pointe Marina. The 1939 aerial photograph submitted by the plaintiff (Exhibit 16), which antedates the construction of either the marina or the mooring area shown in Exhibit 33, clearly shows a natural inlet extending well east of Old Fort Road. Ironically, the aerial photographs supplied by the defendants, *e.g.*, Exhibits 33-36, also demonstrate that this area was part of an inlet to Lake Superior prior to the construction of the marina and relocation of Old Fort Road. Those photographs also clearly show that the disputed property, *i.e.*, the area to the immediate east of the relocated portion of Old Fort

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[20]Defendants' Counterclaim for Condemnation, paragraph 27.

[21]Transcript of Shearman testimony at 13.

Road shown in Exhibits 34-36, was undisturbed by artificial developments until these defendants commenced the Marina Point Condominiums project. That the area continues to be connected by water to Lake Superior is established not only by the testimony and surveys of Mr. Richard Knitter, but can be observed in Mr. Knitter's aerial photographs (Exhibits 5 and 6) which show a direct but rerouted connection by surface waters from the defendants' property, first under Mondamin Trail and then into the marina lagoon, as well as the connection by culverts directly to the marina which was described by both Mr. Knitter and Mr. Shearman. Thus, to the extent that the court finds it relevant to consider whether or not the defendants' property has been lakebed since 1848, the evidence in the record clearly establishes that this property: has not been physically altered in that time; has been a part of or immediately adjacent to an inlet from Lake Superior; lies below the OHWM of Lake Superior; and, despite artificial alterations of the lakebed associated with the marina and Old Fort Road, continues to be connected to Lake Superior by surface water and land lying below the OHWM of the lake.

As suggested by the last paragraph, the court may conclude that the present link to Lake Superior is all that is of concern here and that the historical nexus of this property to the bed of Lake Superior is not relevant to a decision of the plaintiff's sec. 30.12, Stats., claims. As was pointed out earlier in this brief, the law recognizes that the boundaries of riparian properties are ambulatory. Accordingly, it does not really matter what the actual boundaries of the uplands may have been in 1848 since (as the defendants' witness, Mr. Wayne Nelson, acknowledged) shorelines do change, naturally and artificially: sandbars and beach spits (like those shown on Exhibit 81) come and go, deltas may form or inlets may wash out. The critical question is what are the circumstances *now*, and, as argued in the discussion of the plaintiff's *prima facie* case, *supra*, the plaintiff submits that the evidence clearly shows the defendants' property to be a part of the bed of Lake Superior at this time.

To the extent that the defendants may contend that the marina and Old Fort Road constitute a barrier or dam which renders it impossible to consider their land a part of Lake Superior, I pose these questions: Given the legal proposition that a lakebed is an

inalienable property right of the state, can the construction of a road on that lakebed serve to divest the state of title to land on the shallower side of the road? What if such a road equally dissected a body of water so that the acreage and depth of water was the same on both sides — would the lakebed on both sides be subject to development and automatic ownership by the nearest upland owners? I submit that the answer to both questions is an unqualified "no." Anything other than this response would fly in the face of Wisconsin's public trust doctrine. The evidence here shows that the area was and is a part of the bed of Lake Superior, before and after the construction of the road. The presence of Old Fort Road does not operate to refute the state's claim to title to this land.

The final aspect of the defendants' affirmative defenses relating to the sec. 30.12, Stats., claims is the defendants' contention[22] that the plaintiff is estopped from claiming title to land which is part of the bed of Lake Superior. That argument is presumably based on the fact that the DNR did not advise the defendant real estate developers until approximately August 16, 1984 that portions of the site constituted lakebed. There were several reasons why the DNR waited until that date to take the position that the developers had violated sec. 30.12, Stats. As Mr. Duane Lahti, the DNR's Area Water Management Specialist, testified, his initial belief that this area was not lakebed was based in part on the developers-representations as to the nature of the site, that the initial plans submitted to the DNR contained no information as to relative elevations and that, after the developer's abandoned their original plans, he was never provided a revised plan showing the construction which has in fact occurred or is contemplated by these developers. It wasn't until the DNR took its own survey comparing the elevations of the site with that of Lake Superior that the existence of a sec. 30.12, Stats., violation became certain. The plaintiff submits that if the defendants had made any effort to establish the OHWM of Lake Superior (a task shunned by Mr. Shearman) prior to commencing construction, they could and would have come to the same conclusions as the DNR without jeopardizing a substantial invest-

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[22]Amended Answer of Trudeau, *et al.*, para. 16.

ment. The DNR is not in the consulting business, which is to say that developers like these defendants are expected to underwrite the costs of their business enterprises, including such preliminary investigations necessary to determine whether or not they own the property to be developed (i.e., whether or not the land is state-owned lakebed (sic).[23]

Even if the court were to find that the defendant developers reasonably relied on the DNR's failure to advise them at an earlier date that this property was lakebed, estoppel would not lie to divest the state's title to this lakebed property. As noted above, if the state cannot deliberately grant such property to private parties for private development, it certainly cannot lose title to the land as the result of any reasonable or unreasonable inaction or negligence on the part of any state employes. Estoppel does not lie against a government entity in the enforcement of its police powers despite erroneous acts of government officers. *State ex rel. Westbrook v. City of New Berlin*, 120 Wis. 2d 256, 262, _____ N.W.2d _____ (1984). *See also* the case of *Park Bldg. Corp. v. Industrial Comm.*, 9 Wis. 2d 78, 88, 100 N.W.2d 571 (1960), where the court adopted the rule, recognized by other authorities, to the effect that "'the doctrine of estoppel will not be applied against the public . . . where the application . . . would encroach upon the sovereignty of the government and interfere with the proper discharge of a governmental duties, and with the functioning of the government, or curtail the exercise of its police power [citation omitted] . . . .'" While the Wisconsin courts recognize that estoppel may be applied to the government's efforts to assess punitive forfeitures, *State v. City of Green Bay*, 96 Wis. 2d 195, 210, 291 N.W.2d 508 (S. Ct. 1980), the doctrine has no application where, as in this case, the government is acting to preserve its sovereignty by defending its title to lands and to prevent encroachments on lands and waters protected for public use by the public trust doctrine.

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[23]The developers' negligence in not undertaking even these preliminary and, one would assume, fundamental tasks is evidenced by the fact that they accepted a faulty deed (Exhibit 2) for the site which they had corrected (Exhibit 1) only after the error was pointed out to them by the plaintiff.

III. THE PLAINTIFF'S CLAIMS AGAINST THE ASHLAND COUNTY ZONING ADMINISTRATOR AND ASHLAND COUNTY BOARD OF ADJUSTMENT.

In its amended complaint, the plaintiff has asserted three claims against the Ashland County Board of Adjustment and the Ashland County Zoning Administrator. Those claims are that the developers of Marina Point Condominiums were improperly granted a variance from certain floodplain zoning requirements; that the project is improperly being allowed in a shoreland conservancy area; and that the project does not comply with minimum shoreland setback regulations. Before addressing the merits of those claims individually in the discussion which follows, certain issues common to all three claims will first be addressed.

The defendant county officials have first asserted, as an affirmative defense, their immunity from suit as a result of the operation of secs. 59.76 and 893.80, Stats. These statutes, as evidenced by their legislative history and by the case law interpreting them, were intended to apply only to tort actions and not, as in this case, to claims for equitable relief. *See Kaiser v. City of Mauston*, 99 Wis. 2d 345, 357, 299 N.W.2d 259 (Ct. App. 1980) and the prefatory notes of the Legislative Council for 1977 Assembly Bill 375.

The defendants have also questioned the plaintiff's standing to challenge the county's enforcement and administration of its floodplain and shoreland zoning ordinances. The DNR's authority to seek enforcement of the county ordinances is found in the statutes and administrative regulations of this state. Pursuant to sec. 59.971(7), Stats., county shoreland zoning procedures are controlled by sec. 87.30, Stats. That statute, in turn provides, in subsection (2), that the state may seek, as here, abatement of violations of such shoreland or floodplain ordinances. *See also* section NR 116.22(4) Wis. Adm. Code, with respect to violations of county floodplain zoning ordinances. In addition to this express legislative authority to seek enforcement of local shoreland and floodplain zoning ordinances, sec. 751.01, Stats., provides that the remedy of mandamus is available in an ordinary civil action, such as the

one brought in this case, to compel the performance of the county officials' duties to properly enforce their zoning ordinances. Mandamus is the appropriate remedy in such situations. *State ex rel. Lewandowski v. Callaway*, 118 Wis. 2d 165, 171, 346 N.W.2d 457 (S. Ct. 1984). Moreover, mandamus does lie to compel the revocation of land use permits like those issued to the defendant developers. *See* Annotation: Mandamus to Cancel Zoning Permit, 68 ALR 3d 166, § 3, citing *State ex rel. Ryan v. Pietrzykowski*, 42 Wis. 2d 457, 167 N.W.2d 242 (1969).

The defendants also contend that the plaintiff has failed to exercise an exclusive remedy, *i.e.*, certiorari review pursuant to sec. 59.99(10), Stats., with respect to the county's enforcement of the three relevant floodplain and shoreland zoning ordinances. Accordingly, they argue, the plaintiff may not now challenge the county official's actions or inactions. Because sec. 59.99(10), Stats., is not the exclusive means of state review of floodplain and shoreland zoning enforcement and because the defendants made no reviewable "decisions" within the meaning of the statute, the concept of exclusive remedies does not bar the plaintiff's claims against the county officials.

As previously pointed out, sec. 87.30(2), Stats., independently establishes a cause of action to enjoin a public nuisance whenever there exists a violation of any local floodplain or (pursuant to sec. 59.971(7), Stats.) shoreland zoning ordinances. The plaintiff State of Wisconsin, by the Attorney General, is clearly authorized to bring actions to enjoin such nuisances. Sec. 823 02, Stats. Since nuisance actions involve a continuous injury, no statute of limitations applies. This is not a case like those[24] where failure to pursue the *sole* statutory means of review should lead to dismissal, for here there are *several* express statutory means of compelling enforcement of the ordinances: certiorari review under sec. 59.99(10), Stats., or an action to abate a public nuisance pursuant to secs. 87.30(2) and 823.02, Stats. To regard certiorari as the exclusive means of review would render the language of sec. 87.30(2), Stats., mean-

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[24] *E.g. Kegonsa Jt. Sanit. Dist. v. City of Stoughton*, 87 Wis. 2d 131, 145, 274 N.W.2d 598 (S. Ct. 1979), and the cases cited therein.

ingless and that is a construction of the law which courts are to avoid. *Associated Hospital Service v. Milwaukee*, 13 Wis. 2d 447, 109 N.W.2d 271 (1961). Even if certiorari review under sec. 59.99(10), Stats., were regarded as the exclusive means of compelling county enforcement, that doctrine would have no application to the state's claims for enforcement of the conservancy and setback requirements of the Ashland County Shoreland Zoning Ordinance, for the county never made any reviewable decisions with respect to those ordinance provisions. The defendant Ashland County Zoning Administrator conceded on cross-examination that he made no written or formal decision regarding the application of either the conservancy zoning[25] or minimum setback[26] provisions of the Ashland Shoreland Zoning Ordinance, also known as the "Amendatory Ordinance." The use of certiorari, as encouraged by the defendants, however, is inappropriate where there is a question as to whether or not there has been a final decision by the relevant public officials or where there is some doubt as to whether or not the defendants have made a determination in the matter. *State ex rel. Meissner v. O'Brien*, 208 Wis. 502, 504, 243 N.W. 314 (1932). Clearly, certiorari review is of questionable application to claims, such as those in this case, that the government officials simply have not acted to enforce their ordinances; as pointed out earlier, mandamus is the appropriate remedy in such cases. Certiorari review pursuant to sec. 59.99(10), Stats., is not the exclusive statutory means of asserting the plaintiff's three claims against the defendant county officials and, furthermore, would be of questionable applicability to the claims regarding enforcement of the amendatory ordinance. Attention will now be turned to the merits of the plaintiff's various claims against the county officials.

1. The legality of the floodplain zoning variance granted to the defendant real estate developers.

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[25]Exhibit 46, "Amendatory Ordinance," sec. 15.4.

[26]*Ibid.*, sec. 3.2.

The defendant real estate developers applied for[27] and, on January 13, 1984, were granted a variance from the fill requirements[28] of the Ashland County Floodplain Zoning Ordinance. Pursuant to sec. 2.22 of that ordinance, it governs all county lands lying below applicable flood profiles. As Richard Knitter testified, on the basis of the Ashland County flood profile for Lake Superior, the elevation of the flood profile[29] in the La Pointe area is 603.3[1] I.G.L.D. At the time they applied for the variance, the defendant real estate developers apparently believed that the elevation of their property was such that it was governed by the floodplain zoning ordinance; if they didn't believe their property to lie below 603.3[1] I.G.L.D., they never expressed any such belief to the Ashland County Board of Adjustment at the variance hearing. *See* Exhibit O, the minutes of the variance hearing. Moreover, the defendants conceded at the trial that the parties regarded the property as controlled by the ordinance at the time of the variance hearing. These comments are made to demonstrate the

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[27]Exhibit 57.

[28]Exhibit 46, "Flood Plain Ordinance," sec. 4.42.

[29]Exhibit 24.

[1]The Army Corps of Engineers regulations under its § 404 dredge and fill permit program defines the term "ordinary high-water mark" as meaning:

> that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of the soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.

33 C.F.R. § 323.2(f)(1983).

requesting the variance are certainly far more compelling than the fact situation of *Snyder* where the issue was personal convenience of constructing a porch so as to enjoy lake living.

The State also urges that the variance is not consistent with the spirit and intent of the flood plain or shoreland zoning ordinances. This determination clearly lies with the Board of Adjustment and there is no basis for the State to collaterally attack the Board's determination.

With regard to the State's Second Claim generally and the evidence it produced at trial in support of this claim, it is simply a matter of much too little and much too late.

III. *Superior Development's Property Does Not Lie in the Bed of Any Navigable Water.*

The Third and Fourth Claims of the State's Amended Complaint raise the issue of whether the condominium units or portions of the parking lot have been or will be built on the bed of Lake Superior in contravention of Wisconsin Statutes § 30.12. The Fifth Claim of the Amended Complaint raises a related issue concerning a setback requirement under the Ashland County Amendatory Zoning [Shoreland] Ordinance.

Paragraph 29 of the Amended Complaint states that:

> Most of the land underlying the existing cluster — [and the proposed units] of condominiums consist of land below the ordinary high-water mark (*i.e.* the lake bed) of Lake Superior, a navigable water . . . .

The gut issue of this lawsuit is whether any part of the Project Site is or is not on the bed of Lake Superior.

Wisconsin Statute § 30.12 states, in pertinent part as follows:

30.12 Structures and depositions in navigable waters prohibited; exceptions; penalty

(1) General prohibition. Unless a permit has been granted by the department pursuant to statute or the legislature has otherwise authorized structures or deposits in navigable waters, it is unlawful:

(a) To deposit any material or to place any structure upon the bed of any navigable water where no bulkhead line has been established; or

(b) To deposit any material or to place any structure upon the bed of any navigable water beyond a lawfully established bulkhead line.

In interpreting this portion of § 30.12, Wisconsin Statute § 30.10 is relevant. It states, in relevant part as follows:

30.10 Declarations of navigability

(1) Lakes. All lakes wholly or partly within this state which are navigable in fact are declared to be navigable and public waters, and all persons have the same rights therein and thereto as they have in and to any other navigable or public waters . . .

. . . (b) The boundaries of lands adjoining waters and the rights of the state and of individuals with respect to all such lands and waters shall be determined in conformity to the *common law* so far as applicable, ...

The 1959 Legislative Council notes to Wisconsin Statute § 30.10 provide that real issue in every case is navigability in fact. Thus the rules of the common law are to be used to determine what waters are "navigable in fact."

The State has the burden of proving its ownership of this land and must therefore prove that Superior Development's property is navigable in fact. *State v. Beck*, 338 N.W.2d 492 (Wis. S. Ct.

1983). The burden of proof is by preponderance of the evidence. *State v. McDonald Lumber Co.*, 18 Wis.2d 173, 118 N.W.2d 152 (1962).

Superior Development does not quarrel with the proposition that Lake Superior is navigable water and that when Wisconsin achieved Statehood in 1848 it was given title in public trust to the OHWM of Lake Superior. *Illinois Central Railway Co. v. Illinois*, 146 U.S. 387 (1892); *Priewe v. Wisconsin State Land and Improvement Co.*, 93 Wis. 534, 67 N.W. 918 (1896). The public trust doctrine does not per se create a legal right, but merely gives the State standing as trustee to vindicate any rights that are infringed upon by existing law. *State v. Deetz*, 66 Wis.2d 1, 224 N.W.2d 407 (1974).

What Wisconsin was given in 1848 was the bed underlying *navigable* water up to the ordinary high-water mark of that navigable water — but not beyond that point. While lakebed title passed, if the lake were navigable, the State did not receive title to the beds of *non-navigable* lakes, rivers, streams, creeks, springs, swamps, marshes or wetlands.

The ownership of submerged lands by the states was reconfirmed by the federal government under the Submerged Lands Act of 1953. 43 U.S.C. § 1301 *et. seq.* The Act declares that it is in the public interest that "title to and ownership of the lands beneath navigable waters within the boundaries of the respective states *** [be] recognized, confirmed, established, and vested in or assigned to the respective states. ***" 43 U.S.C. § 1311 (1984). The Act further defines the terms "lands beneath navigable waters" as meaning:

> All lands within the boundaries of each of the respective states which are *covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union*, or acquired sovereignty over such lands and waters thereafter, *up to the ordinary high-water mark as heretofore or hereafter modified by accretion, erosion, and reliction.* (Emphasis added). 43 U.S.C. § 1301(a)(1) (1984).

The Submerged Lands Act of 1953 was not intended to alter the scope of or affect state property law regarding riparian ownership. Rather, the effect of the Act was merely to confirm the state's title to the beds of navigable waters within their boundaries as against any claim of the United States Government. *See Oregon ex. rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 371 (1977). However, it is interesting to note that the Act's definition of "lands beneath navigable waters" covers only those lands which are *presently* covered by non-tidal waters *and* which were "navigable under the laws of the United States at the time such state became a member of the Union". When Wisconsin achieved Statehood in 1848, the federal test of navigability revolved around whether the water was used or was susceptible of being used as a highway for commerce. The State has presented no evidence at trial that remotely suggests that Superior Development's property was ever capable of being used as a highway for commerce and, in that it is not covered by water, the State does not hold title to it pursuant to the Submerged Lands Act. Inasmuch as the federal government had previously conveyed the disputed land to a private party by government patent [Trial Exhibit 79], the State is not now in a position to assert that it became the owner of such land when it was granted Statehood in 1848.

The sanctions of Wisconsin Statute § 30.12 are available only to protect the public's right of "navigation" (used in a broad sense) in or on waters which are navigable in fact.

The Wisconsin courts have adopted a recreational boating test for determining navigability. Prior to any significant statutory pronouncements regarding the public use of waters, common law concepts of navigability evolved from standards dealing with log floating to those concerned with pleasure boating and other recreational uses. An extensive explanation of the development of Wisconsin case law concerning navigability can be found in *Muench v. Public Service Commission*, 261 Wis. 492, 499-506, 53 N.W.2d 514, 516-520 (1952), where the Court stated that "it is no longer necessary in determining navigability of streams to establish a past history of floating of logs, or other use of commercial transportation, because any stream is *'navigable in fact'* which is capable of

floating any boat, skiff or canoe, of the shallowest draft used for recreational purposes." (Emphasis in original). 53 N.W.2d at 519.

In *DeGayner & Co., Inc. v. Department of Natural Resources*, 236 N.W.2d 217 (1975), the Wisconsin Supreme Court said:

> [T]he test is whether the stream has periods of navigable capacity which ordinarily recur from year to year, e.g., spring freshlets, or has continued navigable long enough to make it useful as a highway for recreation or commerce. *The test is not whether the stream is navigable in a normal or natural condition, but whether it is in some sense permanently navigable, i.e., regularly recurring or of a duration sufficient to make it conducive to recreational uses.* (Emphasis added). *Id.* at 222.

The State presented no evidence at trial regarding whether any part of Superior Development's Project Site has ever been navigable. Indeed, the State objected on the grounds of relevancy when Superior Development elicited testimony from the State's witnesses and others regarding the fact that a boat, skiff or canoe of the shallowest draft could not float from Lake Superior onto and on Superior Development's property. The evidence introduced at trial conclusively demonstrated that Superior Development's property was not capable of floating *any* craft for *any* duration which would make its property conducive to recreational navigation purposes. Therefore, Superior Development's property is not navigable in the sense which would entitle the State to assert dominion and control over it in trust for the general public. The State did not attempt to prove the elevation of the OHWM of Lake Superior as of 1848.

It is interesting to note that up until the time of *this* trial, the State has used the test of navigability set forth in the *Muench* case.

The current Department of Natural Resources pamphlet on "Navigability" [Trial Exhibit 44] which is available to the public, states in relevant part as follows:

HOW DOES THE DEPARTMENT OF NATURAL RESOURCES DETERMINE THE NAVIGABILITY TODAY?

> . . . *[T]he test of navigability is simple. Using the smallest watercraft* common to a region (usually a canoe) Department of Natural Resources staff paddle through the water.
>
> The waterway should have a bed and sides or banks. In other words, it should be more than just rain water or melting snow flowing in a hollow or ravine.
>
> It is not necessary to be able to float the waterway at all times. Navigability may be established if a stream or lake can be navigated on some regularly occurring basis, such as during the spring thaw . . . (Emphasis in original).

The State, through the Department of Natural Resources, also used the *Muench* test in the *DeGayner* case. In *DeGayner*, Department of Natural Resources employee Richard Knitter testified that one of his duties was to determine navigability and that the appropriate test "in determining navigability was whether the stream was navigable by canoe over 75 percent of its distance for 25 percent of the year". 236 N.W.2d at 220. Since the State introduced *no* evidence at trial regarding the navigability of Superior Development's property, it has failed to meet its burden of proof.

Superior Development introduced Trial Exhibits 80 [the 1852 original government survey] and 81 [the 1854 plat of the Town of LaPointe] to show that there was a distinct shoreline to Lake Superior and that no part of that shoreline abutted Section 32 where the Project Site is located. Even the State's Trial Exhibit 40, introduced through Professor Charles Twining, Chairman of the Northland College History Department, failed to show any "hydraulic connection" between Section 32 and Lake Superior. Again, the State has the burden of proof to show that it is entitled to assert jurisdiction over this property. *State v. Beck*, 338 N.W.2d 492 (S. Ct. 1983); *State v. McDonald Lumber Co.*, 18 Wis.2d 152 (1962).

Superior Development introduced Trial Exhibit 79, the original patent to the NW¼ of the NW¼ of Section 32, in which the project lies. The patent was recorded in 1856. The evidence at trial was that the State had never asserted any claim to this property prior to August 1, 1984.

There is no proof that the Project Site ever was physically underneath (*i.e.* the bed of) any navigable water. The Trial Exhibits show maps and plats from as early as 1852 and photographs from as early as 1939. There is no exhibit in evidence which shows any navigable water on any part of the Project Site. Those exhibits show navigable water adjacent to or on portions of Section *31* but not upon or extending to Section 32 where the Project Site is located.

Elmer Nelson, 62 years old and a lifelong resident of Madeline Island, said that at no time in his lifetime could anyone canoe from Lake Superior onto the Project Site. In the opinion of William A. Shearman, a registered land surveyor, the Project Site has never been a part of the bed of Lake Superior. The plain fact open to anyone to see is that the land on the Project Site is not and, at least since Wisconsin Statehood, never has been in the bed of Lake Superior. The land in question has never been owned by the State of Wisconsin.

The title to swamp lands and marsh lands did not pass to the respective states upon achieving Statehood. While acts of Congress in 1850 and 1855 made swamp lands available to the respective states, there was no automatic transfer of title. These Congressional acts are now codified as 42 U.S.C. § 981 and 42 U.S.C. § 982. Superior Development introduced evidence at trial showing that Superior Development's property passed by patent from the *federal* government to a private individual [Trial Exhibit 79]. The patent is prima facie evidence that all required steps, federal and state, were taken. *Lewis County v. Texas County*, 588 S.W.2d 750 (Mo. Ct. of Appeals 1979) citing *Cramer v. Keller*, 98 Mo. 279, 11 S.W. 734 (1889). A patent of the United States Government, regular on its face, cannot in an action at law be held inoperative as to any lands covered by it. *Ehrhardt v. Hogaboom*, 5 S. Ct. 1157 (1885). Absent direct attack for fraud or mistake, the Secretary of

Interior's decision that a portion of a lake constituted swamp land determines its non-navigability. *Leonard v. Pearce*, 348 Ill. 518, 181 N.E. 399 (1932).

The title that passed to the states was the title to the bed underlying navigable water and not to land which was "hydraulically connected" to navigable water.

Moreover, the purpose of § 30.12 is to preserve navigable waters for use by the public and to preclude the placement of obstructions to navigability in the bed of waters which are navigable in fact. It seems unlikely the public has ever attempted to navigate on any part of this property whose water consists of the runoff from the golf course and a flowing well and whose "hydraulic connection" to the lake is through culverts under a road. One culvert is fifteen inches in diameter. There is no evidence that any culvert is large enough for a canoe to be paddled through carrying a person. Moreover, none of the culverts are actually on Superior Development's property.

The argument that a hydraulic connection is navigable if it connects with navigable water was rejected in the case of *DeGayner Co. v. State*, 236 N.W.2d 217 (1975). That case and the *Muench* case involved placement of dams under Chapter 31. Under § 31.06 many characteristics of a stream are relevant other than navigability. Those characteristics are not relevant to Chapter 30. In the *DeGayner* case, the Sierra Club, as amicus curiae, urged the Court to find the stream navigable because it was a tributary of a navigable body of water and therefore improved the water quality of the Namekagon River. The *DeGayner* Court, in declining to accept the argument, stated:

> . . . [T]he test, proposed by the amicus Sierra Club, has not been recognized by the statutes or by the common law; and, as the trial judge pointed out, that test, in its simplistic form, can be carried to ridiculous extremes, for it would mean that all tributaries, since they eventually run into some navigable body of water, must be held navigable . . . 236 N.W.2d at 223.

Despite the fact that Superior Development's property is not now, and has not been shown to ever have been navigable under either the federal "commerce test" or the "recreational test" adopted by the Wisconsin courts, the State claims ownership to Superior Development's Project Site because it lies below the OHWM of Lake Superior. In order to establish its right to abatement of the alleged nuisance, the State must therefore establish by a preponderance of the evidence the location of an OHWM on Superior Development's property. *State v. McDonald Lumber Co.*, 18 Wis.2d 173, 118 N.W.2d 152 (1962). The State has failed to meet this burden.

The State's evidence of establishing that Superior Development's Project Site is part of Lake Superior may be summarized as follows:

1. Lake Superior is navigable in fact and the OHWM of Lake Superior is elevation 602 feet.

2. Superior Development's property is hydraulicIly (hydrologically) connected to Lake Superior through a culvert fifteen inches in diameter.

3. Portions of Superior Development's property are below elevation 602 feet and therefore part of Lake Superior.

The State's analysis is deceptively simple. The analysis is also deceptive in that it is without basis in law as noted by the *DeGayner* Court. Counsel for the State has stated that the term "hydraulic connection" was a term the State arrived at in preparing for trial. The State does not concede that the "hydraulic connection" needs to be navigable. Superior Development contends that the term "non-navigable" is a more accurate term to describe the sometimes connection between the Project Site and Lake Superior. The distinction between these terms is significant.

According to the greater weight of authority, the State's title to the lake bed runs to a line which is called the OHWM. *State v. McDonald Lumber Co., supra.* (Compare *C. Beck Company v. Milwaukee,* 139 Wis. 340, 120 N.W. 293 (1909)(holding that the

title to the bed of the lake *below* the OHWM is in the state); *Mariner v. Schulte*, 13 Wis. 692 (18)(holding that proprietors of land on the shore of a pond or lake hold down to the low water mark). The term OHWM appears to have no universally accepted definition.[1] In those cases in which the courts have been called upon to apply the concept, one finds little in the way of a comprehensive definition.

In the State of Wisconsin, the still-accepted definition of the OHWM is contained in *Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816 (1920), where the Court stated:

> By ordinary high-water mark is meant the *point on the* bank or *shore up to which the presence and action of the water is so continuous as to leave a distinct mark* either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. *** *And where the bank or shore at any particular place is of such a character that it is impossible or difficult to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to* determine whether a given stage of water is above or below [the] ordinary high-water mark." (Emphasis added). 145 N.W. at 820.

The above test which is known as the "vegetation test" regarding OHWMs has been addressed by the United States Supreme Court in *Howard v. Ingersoll*, 54 U.S. 381 (1851).

In defining a water's outer line (i.e., high-water mark) under the vegetation test, the Supreme Court stated:

> It neither takes in overflowed land beyond the bank, nor includes swamps or low grounds liable to be overflowed, but reclaimable for meadows or agriculture, or which, being too low for reclamation, though not always covered with water, may be used for cattle to range upon, as natural or uninclosed pasture. But it may include spots lower than the bluff or bank, whether there is or is not a growth upon them, not forming a part of that land

> which, whether low or are within the bed of the river. *Such a line may be found upon every river, from its source to its mouth. It requires no scientific exploration to find or mark it out. The eye traces it in going either up or down a river, in any stage of water.* (Emphasis added).
>
> *Id.* at 415-16.

It is clear from the language of *Howard v. Ingersoll* and *Diana Shooting Club* that an OHWM should be visible to the naked eye and does not require scientific exploration for its determination.

The issue of the determinations of OHWMs has been addressed by many courts.

In *In re Minnetonka Lake Improvement*, 56 Minn. 513, 58 N.W. 295 (1894), the Minnesota Supreme Court found erroneous the lower court's assumption that the "high-water mark" means the extreme line which the water reaches (even outside its natural bed) in times of high water caused by rains or melting snows which are not unusual or extraordinary but which occur frequently during the wet season. The Court found that the consequences of such a determination, if taken to its illogical extremes, would be "startling" on riparian landowners. *Id.* at 521. In discussing the concept of the "high-water mark" Justice Mitchell stated:

> *"High-water mark" means what its language imports, a water mark. It is co-ordinate with the limit of the body of the water; and that, only, is to be considered the bed which the water occupies sufficiently long and continuously to wrest it from vegetation, and destroy its value for agricultural purposes.* Ordinarily, the slope of the bank and the character of its soil are such that the water impresses a distinct character on the soil, as well as on the vegetation. *In some places, however, where the banks are low and flat, the water does not impress on the soil any well-defined cases, the effect of the water upon vegetation must be the principal test in determining the location of high-water mark, as a line between*

> *the riparian owner and the public.* It is the point up to which the presence and action of the water is to continuous as to destroy the value of the land for agricultural purposes by preventing the growth of vegetation, constituting what may be termed as ordinary agricultural crop, — for example, hay. (Emphasis added).
>
> *Id.* at 522.

The relevance and method of ascertaining the OHWM was definitively explained in *Borough of Ford City v. United States*, 345 F.2d 645 (3rd Cir. 1965), *cert. denied*, 382 U.S. 902 (1965). There, the borough brought a civil action against the United States alleging that the government's construction of a lock and dam on the Allegheny River resulted in damages to the borough's sewerage system. The central issue in the case was whether the government's construction activities had raised the OHWM of the river in the area of the Ford City sewer system. If so, the defendant would be found responsible for any damage caused plaintiff by reason thereof.

In finding that the OHWM had *not* been raised by the government's construction activities, the Court noted that the demarcation of boundaries along navigable streams is generally readily *observable*. The Court went on to explain that the OHWM usually can be detected by observing the presence of multiple factors, including shelving, a change in the character of the soil, the absence of litter, and the destruction of terrestrial vegetation. When the multiple factors comprising a high-water mark cannot be found in one location, it is permissible to check for them at other sites along the stream. *Id.* at 645-648. If these multiple phenomena cannot be found, resort to the so-called "vegetation test" alone is appropriate. Under these circumstances the high-water mark rests at the point below which the value of the soil for agricultural purposes has been destroyed. This does not mean that vegetation is absent below the mark, but rather that terrestrial vegetation will not grow here.

The relevant case law treats the OHWM as being the demarcation line between public and private property.

The State Department of Natural Resources' current pamphlet on OHWM [Trial Exhibit 43] states:

> The ordinary high-water mark (OHWM) is the point on the bank or shore where the water is present often enough so that the lake or stream bed begins to *look* different from the upland. Specifically, the OHWM is the point on the bank or shore up to which the water, by its presence, wave action or flow, leaves a distinct mark on the shore or bank. The mark may be indicated by erosion, destruction of or change in vegetation or other easily recognizable characteristics. (Emphasis in original).

The OHWM is to be a *visible* mark. Chapter 236 Wisconsin Statutes which relates to platting lands, refers to the OHWM and requires placement of iron monuments a certain distance back from the OHWM. As Mr. Shearman testified, registered land surveyors must be able to recognize OHWMs. He knows what an OHWM looks like from his training and work experience. There is no OHWM present *as a visible mark* on the Project Site. Certainly no photographs were introduced to show a visible OHWM on the Project Site. Trial Exhibits 14 and 15 show an example of the OHWM on the shoreline of Lake Superior. These photographs were taken over *one-half mile* away from the Project Site.

Duane Lahti, a biologist with the Department of Natural Resources, who has made about 200 OHWM determinations, was at the Project Site on November 1, 1983.

At the time of this visit by many interested people to discuss building plans, Mr. Lahti did not see any visible sign of an OHWM. Mr. Lahti's letter of November 4, 1983 [Trial Exhibit 4], which discussed the meeting, did not mention any finding of an OHWM.

The State contends that the transfer test set forth in the *Diana Shooting Club* case justifies the analysis it used on Superior Development's property. The test bears repeating:

> . . . And where the *bank or shore at any particular place* is of such a character that it is impossible or difficult *to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake* to determine whether a given *stage of water* is above or below the OHWM. 145 N.W. at 820. (Emphasis added).

As is evident, the above test is not applicable to the immediate fact situation and therefore not available to the State.

In fact, the only justification for "transferring" the OHWM to the Project Site by survey methods is because the OHWM is not visible. The reason an OHWM is not visible on the Project Site is because one does not exist. The State in its argument improperly seeks to prove as true that which it assumes is true. It seeks to prove that the property is below the OHWM of Lake Superior by *assuming* as true that at some past or current time a part of the shoreline of Lake Superior lay on the Project Site. The transfer test by its very terms as set forth in the *Diana Shooting Club* case is not available to the State. The transfer language is to be utilized when for some reason the wind and wave action, though present, have failed to leave a clearly discernable line upon the shoreline of a lake or the bank of a river or stream. In this case there is no evidence nor even any reasonable inference which could be drawn to indicate that the waters of Lake Superior were ever driven by wind or wave action onto any part of the Project Site. There has been *no* testimony introduced by the State that any bank or shore (much less that of Lake Superior) exists on Superior Development's property. The State introduced no evidence that there was any point on Superior Development's property where the presence and action of *the waters of Lake Superior* were so continuous so as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. The State has introduced no evidence to show that it was attempting to determine whether a *given stage of water* on Superior Development's property was below the OHWM of Lake Superior. The State has introduced no evidence to show that to the extent any water is found on Superior Development's property, that such water constitutes the same lake as Lake Superior. To

the extent *any* water exists on Superior Development's property, and further to the extent that water runs through a culvert with a 15 inch diameter to Lake Superior, the State has failed to show the connection is navigable under the *Muench* test and any water on Superior Development's property has not been shown to be part of Lake Superior. Therefore, the State is *not* making recourse to the bank or shore of the *same lake* when it takes the OHWM of Lake Superior at the marina and transfers it across Old Fort Road onto Superior Development's property.

The State's bootstrap argument does not serve to prove that the points on the Project Site which Mr. Knitter surveyed were ever, since 1848, on the shore of Lake Superior.

The State's argument that portions of the Project Site are below elevation 602 feet simply begs the question as to whether the property is a part of Lake Superior.

It is clear that the fact situation in the immediate action prohibits the State from using the alternate test of determining an OHWM on the shore of the same lake and transferring it as provided for in *Diana Shooting Club v. Husting* because it is inapplicable. The State must therefore show that an OHWM exists on Superior Development's property without regard to elevations.

Given the various judicial analyses of determining the OHWM at any particular location, the predominant consideration appears to be whether there exists terrestrial, as opposed to aquatic, vegetation at that *particular* location. Here, it appears that the brush, grasses, and other vegetation growing on the disputed land could reasonably be classified as being more terrestrial than they would be considered aquatic. Further, the State has produced no evidence that signs of erosion are visible on Superior Development's property. To the contrary, there exists no *easily recognized characteristics* which would suggest that, at this specific location, the high-water mark of Lake Superior extends now, or ever extended in the past, up to that point where the Project Site is located while easily recognized characteristics are present to indicate the location of the high-water mark in the area, those characteristics are found on the shoreward side of road running between Lake Superior and

Superior Development's property. The State's method of proof is not only invalid in that it runs counter to the generally recognized tests for calculating the OHWM at any particular location, but the State has further failed its burden of proof by the fact that no evidence, regardless of method, suggests that the disputed land is now, or ever was, within the OHWM of Lake Superior.

In *State v. McDonald Lumber Co.*, 18 Wis. 2d 173, 118 N.W.2d 152 (1962), the State sought to enjoin the defendant from excavation and filling activities allegedly conducted in the lake bed of the waters of Green Bay. The State's success in obtaining injunctive relief hinged upon its ability to establish with accuracy an old shoreline upon what was then upland. The Wisconsin Supreme Court was asked to determine whether a specific portion of property occupied by the defendant was located upon lake bed belonging to the State. After recognizing that "[t]he state's title to the lake bed runs to a line which is called the 'ordinary high-water mark'," the Court upheld the lower court's conclusion that the State failed its burden of proving its ownership of the land by failing to establish the location of the OHWM by a preponderance of the evidence. *Id.* at 154. In *McDonald*, rather than attempting to establish an OHWM on the property by showing a distinct mark created by erosion, destruction of terrestrial vegetation or some other easily recognized characteristic in the manner presented in *Diana Shooting Club v. Husting*, the State, as in the immediate case, offered proof as to the average of the high-water level of the Great Lakes as determined by the U.S. Army Corps of Engineers over a certain time frame. Using that, the State attempted to fix the high-water mark at 581 feet above sea level and from that benchmark sought to establish that the defendant was trespassing and committing a nuisance upon the State's land. In refusing to adopt the State's proof as to the OHWM, the trial court said:

> *Before a court can grant a remedy**** *it is imperative that the area which constitutes the nuisance and its abatement must be established with reasonable certainty.* Unless so established a judgment cannot be declared and equally important cannot be enforced by contempt or otherwise.***The burden of proof rests upon the plaintiff and it has failed to meet [that] burden***. *The court*

cannot indulge in speculation and conjecture as to what part, if any, of fill or warehouse footings constitutes a nuisance and what does not or what may be abated and what may not. (Emphasis added).

118 N.W.2d at 154.

The State's argument is wrong also on policy grounds. Wisconsin Statute §30.12 is a statute which carries with it the possibility of a fine and jail sentence. Ordinary people should be able to tell when their conduct violates a criminal statute. Here a registered land surveyor who has visited the Project Site more than 30 times is of the opinion that there is no OHWM on the Project Site and that the Project Site is not a part of the bed of Lake Superior. Even Mr. Lahti did not conclude on November 1, 1983 that the Project Site was in the bed of Lake Superior. Moreover, if the property is deemed a part of Lake Superior using the State's argument, then Superior Development would be a riparian owner.

It is generally recognized that a riparian owner has a qualified right to the land between the actual water level and the OHWM — the riparian owner may exclude the public therefrom but he but he may not interfere with the rights of the public for navigation purposes. *See Doemel v. Jantz*, 180 Wis. 225, 235, 236, 193 N.W. 393 (1923). As such, Superior Development has the right to construct a dock or pier on the navigable water. *Diedrich v. The Northwestern Union Railway Co.*, 42 Wis. 248 (1877). In *Doemel*, the Court considered whether a member of the public could legally enter upon and use for public travel a strip of land adjacent to plaintiff's upland and lying between the ordinary high and low water marks of a lake without committing an actionable trespass. The plaintiff, a riparian landowner, argued that his title extended to the low-water mark of the lake, or, if it was determined that his title extended only to the OHWM, that he nevertheless possessed an exclusive right to use the shore between the low and high water marks and that any entry upon such land by the defendant constituted a trespass. On the other hand, the defendant and the State contended that the plaintiff's title extended only to the high-water mark, that the title to the land between the ordinary high and low water marks is held in trust by the State for the benefit of the public,

and, further, that if the plaintiff was found to hold a qualified title to the disputed land, such land was subject to a public easement not only for the purposes of navigation but also for travel and other general public purposes.

In finding that a riparian landowner holds a qualified title to those lands lying between the low and high water marks of a lake, the Court stated:

> This doctrine also seems to be in perfect harmony with the natural order of things. During certain periods of the year when precipitation is large, and when the waters of the lakes are swelled by increasing volumes coming from springs, rivers, creeks, and the flowage of surface water and the precipitation in the form of rain, the lake exercises its dominion over the land to the high-water mark. This dominion, however, is not permanent.*** As to inland lakes and rivers, such assertion of dominion on the part of nature is *when the waters recede, those rights are succeeded by the exclusive rights of the riparian owner. So that during periods of high water the riparian ownership represents a qualified title, subject to an easement, while during periods of low water it ripens into an absolute ownership as against all the world, with the exception of the public rights of navigation.*** (Emphasis added).
>
> 193 N.W. at 398.

This language in *Doemel* is particularly striking in that it implies that a riparian owner holds a *qualified title*, subject only to public easement rights, in land lying *below* the OHWM during times of high water and holds an *absolute* title to those lands, subject only to public navigation rights, during periods of "low" water. This suggestion that a landowner holds, at a minimum, a qualified *title* in land to the *low* water mark of a lake is reinforced later in *Doemel* when the Court said: "Early in the history of this state this court, in harmony with other courts, has *firmly declared that the title of a riparian owner on a navigable inland meandered lake extends to [the] low water mark.*" (Emphasis added). *Id.* at 398.

The law of accretions and relictions also applies to the rights of a riparian owner. If, in fact, the OHWM of Lake Superior extends to the Project Site, Superior Development, as the riparian landowner, can exclude all persons from the land lying between the OHWM and the low-water level as an incident of such ownership. Even if the Court should hold that the State's title extends to the OHWM *and* that the State's survey of the OHWM is valid, the State's title to any such land is nevertheless subject to partial divestment through application of the law of accretions and relictions. See *Boorman v. Sunnuchs,* 42 Wis. 233 (1877); *Roberts v. Rust,* 104 Wis. 619, 80 N.W. 914 (1889); XII Op. Atty. Gen. 361, 361-62 (1923); XVII Op. Atty. Gen. 41 (1928); II Op. Atty. Gen. 589 (1913).

Further, as discussed in connection with the First Claim, Ashland County as does all other counties, pursuant to State mandate, regulates shorelands within 1000 feet of navigable lakes. Should the State's argument prevail, there will be property owners throughout Wisconsin who will be subject to land restrictions they would never have dreamed could apply to them. Hence, on policy grounds the State's arguments should be rejected.

The State has failed to meet its burden of showing the Superior Development's property is navigable in fact. The State has failed in its attempt to show an OHWM on Superior Development's property and is precluded from transferring the OHWM of Lake Superior to Superior Development's property by the express language of the caselaw that the State relies upon. It is clear why the State has attempted to transfer the OHWM rather than find one on Superior Development's property. The reason an OHWM cannot be found on Superior Development's property is simply that one does not exist there.

Under the Fifth Claim of its Amended Complaint, the State seeks to apply the set-back provisions of the Ashland County Amendatory Zoning Ordinance. The ordinance states in Section 2.1 that:

> Normal high-water elevations, where not established, shall be determined by the Zoning Administrator.

The setback provisions of Section 3.1 refer to "the normal high-water elevation of any navigable water." The Zoning Administrator testified that he determined the existing building (Cluster A) was set back 90 feet from where he determined the "normal high-water elevation" to be in the Marina across Fort Road and the setback requirements of the Ashland County Amendatory Zoning Ordinance had therefore been complied with.

It defies common sense to believe that this property, separated from Lake Superior by the Marina, which is privately owned, the Marina parking lot, a berm with trees, and by the Old Fort Road, constructed with the approval of the Department of Natural Resources, somehow now is in the bed of Lake Superior and the public's rights to use navigable water requires enforcement of §30.12.

A considerable amount of time was spent in the evidence concerning survey methods used to determine elevations on the Project Site. That evidence as to where elevation 602 feet lies is irrelevant if the Court agrees with Superior Development's contention that the State is using the wrong test to determine whether the Project Site lies in the bed of navigable waters under §30.12.

The State has set out to prove that, assuming the Project Site is part of the bed of Lake Superior, obstructions to navigation placed below the OHWM of Lake Superior are proscribed by §30.12. Mr. Knitter testified that his surveying of October 25, his knowledge of surveying done at Port Superior and his knowledge of biological studies permitted him to conclude that the OHWM of Lake Superior expressed in International Great Lakes Datum (I.G.L.D.) would be at elevation 602 feet.

Mr. Knitter surveyed the ground elevation at two spots on the building (Cluster A) as shown on Trial Exhibit 13. He found the building at those two spots to be at elevation 602.64 feet and elevation 601.99 feet. He inferred the elevation of other parts of the building were below elevation 602 feet; however, he did not say how much below 602 feet. Mr. Knitter acknowledged there was a factor of inaccuracy in his survey.

Mr. Shearman testified that the property in terms of I.G.L.D. is .8 feet (8/10s of a foot) higher than the elevations marked on Trial Exhibit 82. This would make all elevations shown on Trial Exhibit 82 above elevation 602 feet in I.G.L.D. Mr. Shearman started and closed his survey to check the elevations by starting at a known permanent benchmark from the Corps of Engineers on the Ferry Pier at LaPointe. He did not use the level of the lake to determine the accuracy of his survey.

Further, on October 31, 1984, using permanent benchmarks established by the Corps of Engineers, Mr. Shearman started and closed his survey to three permanent benchmarks. He found the elevation of the ground at the corners of Cluster A which he shot were at elevations 602.2 feet, 602.0 feet, 602.0 feet, 602.1 feet and 602.2 feet, as shown on Trial Exhibit 83.

Mr. Shearman's survey taken from established, permanent official benchmarks and closed back to those benchmarks is a more accurate survey. The work he performed can be re-created by any other surveyor. Mr. Shearman's "checking back" in or closing at the permanent benchmarks he started at means he knows he made no errors.

Mr. Knitter used the water elevation at Bayfield as his starting point. He assumed the water elevation at the LaPointe Ferry Pier and at the Marina would be at the same elevation. There is no evidence from the State as to the tolerance for accuracy of the seasonal water gauge installed (and since removed) at the Bayfield Coast Guard Station.

On October 25, 1984, Mr. Knitter could not get a usable water elevation. He used a "mark" he had made on the Ferry Pier at LaPointe as his starting point. He again assumed the water level at the Ferry Pier was exactly the same as the water level in the Marina. Mr. Knitter testified that a good survey practice to run a level run survey was to start at and return to a benchmark of known elevation.

Mr. Knitter made no effort to "check back" or close his survey to his starting point.

The question for the Court to decide is whether to hold the State has carried its burden of proof to show that Superior Development has built Cluster A in the bed of Lake Superior and that it must be moved based upon Mr. Knitter's survey or that Cluster A is at or above elevation 602 feet based upon Mr. Shearman's survey.

The Court was given no testimony to indicate where or at what elevation there may have been some fill from the parking lot at or below elevation 602 feet. This was testified to as a matter lying within the jurisdiction of the Corps of Engineers and a satisfactory agreement with the Corps of Engineers has been reached by Superior Development.

IV. *The State's Request for Imposition of Forfeitures Against Superior Development is Barred by the Equitable Principles of Estoppel.*

The State has asked the Court for several forms of relief (removal of structures, an injunction against further development and assessment of forfeitures pursuant to Wisconsin Statute §30.12) against Superior Development. The State's claims for relief are based on the premise that Superior Development has placed a structure on the lake bed. As addressed elsewhere in this Brief, the State has failed to meet its burden of proof in establishing this premise. Assuming, arguendo, that the State had met its burden of proving this premise, certain of the State's claims against Superior Development are barred by the principles of estoppel.

The uncontroverted testimony from the State is that the claim that Superior Development's property was part of the lake bed of Lake Superior was first formulated by the State on August 1, 1984. At that time, the value of Superior Development's improvements on the Project Site was in excess of $400,000.00. Prior to August 1, 1984,

site is navigable would be relevant only if the plaintiff claimed that the site constituted a separate lake. The plaintiff's theory, as articulated in the complaint and throughout this litigation, however, is that this area is part of the bed of Lake Superior, a water body they concede (Superior Development's Brief at 20) to be navigable. Thus, the reference to the case of *De Gayner & Co. v. DNR*, 70 Wis. 2d 936, 236 N.W.2d 217 (1975) is misplaced, not only because it does not refer to the law regarding ownership of lakebeds, but because it does not matter whether a canoe could be floated on the premises of the Marina Point Condominiums. As pointed out in the plaintiff's Post-Trial Brief at pages 4-7 and 26-30, the state's title to the beds of navigable lakes goes to the ordinary high water mark (OHWM) which may include shoals, heavily vegetated areas and the portions of a beach (*i.e.*, dry land) between the OHWM and the actual lake level. Contrary to the developers' contention (Superior Development's Brief at 23-24) that the state has failed to prove navigability of the water on the site, the plaintiff's position is that there is no need to prove such facts. Since, as discussed in the Plaintiff's Post-Trial Brief, the road and marina cannot operate to sever the state's title to this land, since the existence of aquatic vegetation and the absence of an erosion line do not preclude the establishment of property as lakebed, and since federal acts (like the Swamp Acts or the Submerged Lands Act) and patents subsequent to statehood (1948) cannot divest state title, this land belongs to the people of Wisconsin.

Page 24:

The developers' suggestion that Exhibits 80 and 81 show a "distinct shoreline" is a considerable overstatement of the facts. In this case we are concerned with the location of the OHWM. Nothing in either exhibit suggests any attempt to portray the OHWM of Lake Superior. Moreover, contrary to the defendants' statement that neither exhibit shows a shoreline abutting section 32, Exhibit 80 shows a water body in section 32 and Exhibit 81 shows an inlet in the immediate vicinity of the present project site. *See also*, the discussion of this point in the plaintiff's initial brief at pages 27-28. Again, the defendant's contention that the plain-

tiff has failed to show navigable water on the condominium site begs the real question in this case: is the land a part of the bed of Lake Superior?

Page 25:

With respect to the significance of the Swamplands Act, it is noteworthy that the developers agree with the plaintiff that there was no automatic transfer of title resulting from this legislation. As argued more fully on pages 23-24 of the plaintiff's main brief, the Swamp Acts have no application to this case.

Pages 25-26:

The developers' characterization of the purpose of sec. 30.12, Stats., is abbreviated in a most self-serving manner, in that it refers to only one of the three policies referred to in the statute. The other two, both relevant to this case, are to consider possible reductions in flood flow capacities and, more generally, the public interest. *See* sec. 30.12(2), Stats.

Page 27:

The developers' suggestion that only one culvert connects the site by water to Lake Superior ignores the connection under Mondamin Trail. This connection is readily visible in one of the aerial photographs (Exhibit 6).

Pages 28-29:

The developers' reference to *Howard v. Ingersoll*, 54 U.S. 381 (1851), is not only unnecessary in light of the long line of Wisconsin cases more on point (*see* Plaintiff's Post-Trial Brief at 4-7) but, unlike this case, involves a stream instead of a lake. The reference to the Minnesota case on page 29 of their brief is similarly unfounded. In Wisconsin, the seminal case on this issue, which needs no further elaboration to be applied in this case, is *Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816 (1914). Whether or not courts in other jurisdictions may require a visible OHWM at all

points along a lake, it is clear that Wisconsin law permits the transfer of elevations along a shore from a point with a well defined OHWM to points elsewhere where the OHWM is less easily ascertained.

Page 32:

The developers mischaracterize the *Diana* case when they suggest that transfers of lake elevations are permissible under that decision only when "wind and wave action, though present, have failed to leave a clearly discernible line upon the shoreline of a lake." They argue, therefore, that transfers may not be made where, as in this case, *vegetation* tends to obscure the shore line. They neglect to mention that the complicating factor in the *Diana* case was vegetation which grew to a height of four to five feet above the water's surface. The developers' willingness to take such liberties in characterizing the nature of the law of this state reflects the merits of their arguments.

Page 33:

The state need not prove that the connection between the condominium site and the main body of Lake Superior is navigable anymore so than it needs to prove that the water on the project site itself is navigable. The defendants' suggestion that the site of their project is a lake distinct from the Superior was anticipated and addressed at pages 26-30 of the Plaintiff's Post-Trial Brief.

Page 34:

The developers' contention here that the "vegetation could reasonably be classified as being more terrestrial than they would be considered aquatic" is remarkably unsupported by the evidence in the case. The only defense witness who testified on this subject described the vegetation as a "wetland vegetation" (Transcript of William Shearman's testimony at 37). The plaintiff's witnesses, who included a specialist in aquatic biology, described the vegetation as aquatic and even listed some "open water" species of plants. The *only* evidence in the record of this case is that the vegetation is aquatic in nature.

Page 35:

The developers' argument tht (sic) the plaintiff employed an impermissible statistical averaging methodology in concluding tht (sic) the OHWM of Lake Superior is 602.0' I.G.L.D. indicates either a misunderstanding or a misrepresentation of the plaintiff's evidence. The technique disapproved in *State v. McDonald Lumber Co.*, 18 Wis. 2d 173, 118 N.W.2d 152 (1962), involved an averaging of high-water levels over a 100-year period, *id.* at 176-77, as opposed to proving any high-water *mark*. In this case, Mr. Knitter and Mr. Lahti not only established an elevation for an OHWM on La Pointe, but Mr. Knitter testified that his conclusions in this case were corroborated by his ordinary high-water *mark* determinations (*i.e.*, not ordinary high-water level averages) elsewhere in the Chequamegon Bay area.

Pages 36-38:

To say, as the developers do here, that a riparian has exclusive access to land between the OHWM and the actual lake level does nothing to establish their unqualified title to all land lying below the OHWM. If we were dealing in this case only with land between the OHWM and the low water mark, the defendants' reference to the case of *Doemel v. Jantz*, 180 Wis. 225, 193 N.W. 393 (1923), might have some arguable relevance. Here, however, the evidence is that the disputed property is covered by water (*i.e.*, it is lower than a low-water mark). Furthermore, the "qualified title" referred to in the *Doemel* decision would have to be stretched considerably to allow a private condominium development on land which the *Doemel* court referred to as "subject to the [public] trust under and pursuant to which the state has title for the benefit of the public." *Id.* at 237. It should also be remembered with respect to the *Doemel* court's questionable characterization of riparian title on page 238 of the decision, that in this case we are not dealing with either an inland or a meandered lake.

Pages 40-41:

The discrepancies between the testimony of Richard Knitter and William Shearman have been discussed at length at pages 4-17

and 38-40 of the plaintiff's initial brief. One additional comment regarding the relative credibility of these two witnesses will be made here. Although Mr. Shearman testified (Transcript at 34) that he did not know what datum system he used for his initial survey (Exhibit 82), he admitted that this survey was used by the defendant developers' architects in developing their plans for the condominium project (Transcript at 17). Those plans (Exhibit 12) not only express elevations in terms of I.G.L.D., but they also corroborate Mr. Knitter's conclusions as to the I.G.L.D. elevations of various points at the site. Mr. Shearman's belated effort to disavow his earlier survey should be entitled to very little weight.

Pages 44-45:

The subject of estoppel is discussed at pages 30-32 of the Plaintiff's Post-Trial Brief. Since the plaintiff is no longer requesting the assessment of forfeitures (at least for existing violations of sec. 30.12, Stats.) and since the developers concede that "the Wisconsin Supreme Court has not *to date* allowed estoppel to be involved against the government when the application of the doctrine interferes with the police power for the protection of the public health, safety or general welfare" (Superior Development's Post-Trial Brief at 44-45), it would seem that there is perhaps no dispute that the state may not be estopped from seeking removal of the statutory public nuisances (the buildings and parking lot fill) to protect public interests in ownership of lakebed, wetland preservation, navigation and flood control pursuant to secs. 30.12 and 30.15, Stats.

REPLY TO THE BRIEF OF THE ASHLAND COUNTY BOARD OF ADJUSTMENT AND THE ASHLAND COUNTY ZONING ADMINISTRATOR

Page 2:

The defendant county officials' assertion that conservancy zoning, setback requirements and floodplain variances were all discussed at the January 13, 1984 variance hearing is an

APPENDIX G

MR. DOSCH: I don't want to make any kind of belabored opening remarks. I believe the trial outline does a pretty good job of summarizing. I will save my legal arguments for the post-trial briefs. I think it is obvious there are a lot of legal questions.

I would like to point out our position on one aspect of the lake bed. The State believes it acquired title to the lake bed on Statehood; title to navigable lake beds and Mr. Martell has conceded that includes Lake Superior. It is not the law that the State title is frozen as of 1848. The laws of appreciation, relation, erosion always come up and can either operate to the State's benefit or detriment, so the line isn't necessarily fixed as of one date in history.

That is a small point I want to make here. That is the only argument that I will make at this time.

THE COURT: Anybody else want to make any argument?

You may call your first Witness.

APPENDIX H

being required from the Corp (sic) of Engineers to fill, that that permit would either be delayed so long or possibly not issued at all. That it wouldn't go forward.

I suppose there would exist the possibility that down the line the Court could have granted such a permit and then you would get to the merits of the placement of the fill and that would present some other difficulties due to other facts that are also referred to in that transcript: The damage of the environment; damage to the wetlands that the DNR and the Corp (sic) was saying shouldn't take place.

We see there was evidence before the Board of Adjustments and it is very clear from the transcript that the legal standards were raised before the Board of Adjustments, so that is where we think the evidence will go on that second count.

The third, fourth and fifth counts refer to what we might characterize as title to the lake or ordinary high water mark or the bed of Lake Superior and they refer to Wisconsin Statutes 30.12 and 30.12 essentially says that no one shall place anything in the bed of a navigable water without first getting a permit from the Department of Nature Resources.

Obviously, that is a paraphrase. 30.12 is part of a statutory scheme, which includes Section 30.10, which indicates to determine navigability you use the rule of the common law and we are going to be talking about some issues, I think, of title to the lake bed.

We expect that the evidence will show that our title devolves from a patent that was issued by the United States in June of 1855. The property that was first surveyed in 1952 [sic 1852] and platted in 1854 and that those early surveys and plats do not show our property has any connection to Lake Superior.

The State at one point in its brief indicates that it obtained title to the bed of Lake Superior up to the ordinary high water mark upon admission to Statehood. We have no quarrel with that

general proposition of law. At the time of Wisconsin Statehood, federal law in an early Wisconsin case used what might be called the saw-log test of navigability and we say that would control the title the State obtained at the time of Statehood.

We will also later be calling to the Court's attention a federal statute, the Swamp Land Act of 1855 and subsequent decisions of the United States Supreme Court and other courts, which indicate that title to swamp land or marsh land adjacent to a lake did not pass to the State; that ownership of swamp land or marsh land would pass to the Patentee and that could be a State or it could be a private individual and that issue, your Honor, we claim is important in relation to the character of the land between our property and the lake.

Our property sits probably four to 600 feet back from what our side will say is the normal lake shore of Lake Superior as it existed in the 1840's and 50's.

In this century a small boat slip area was dug out and in the 1960's a marina was created and a road was placed around that marina between our property and the lake and we say that as to our property it was contiguous to land that might be regarded as swamp or marsh land under the 1855 Act and the title didn't pass on that to the State of Wisconsin.

We are going to have testimony focused on the condition of the property both before and after the improvements to the marina; the improvements to the marina resulted in a road being built between us and the lake, which, unquestionably, is a road at a much higher elevation than the high water mark of the lake and we believe that is a significant under doctrines whereby the State would be conceding that the boundary between our land and the lake would be located on the lakeward side of that road.

We expect that there will be testimony from the State that they will claim that the ordinary high water mark of Lake Superior is at an elevation of 602 I.G.L.D., International Great Lakes Data.

I have got a little education in this case about surveys. I thought elevation 602 would be 602 feet above sea level and everybody could agree on where that was. I found the different federal agencies have different survey networks and their elevations can differ by as much as several feet, and so to say that a Surveyor has located a particular elevation at a particular height above sea level does not necessarily convert it into the I.G.L.D. data grid, so we have surveys that range from 89 tenths of a foot below I.G.L.D. to 2.3 feet above. In other words, a spread of about three feet vertically in trying to determine what elevation 602 would be to go out and measure in the field.

We say that the common law is that the State would own to the ordinary high water mark as that mark is exhibited on the land where the vegetation has changed through the forces of wind or wave action; that no such ordinary high water mark exists on our property.

The ordinary high water mark elevation does exist about 90 feet or more away in the marina, which is an artificial body of water; that under the Shore Land Ordinance the determination of normal high water elevation is a determination to be made by the Zoning Administrator and that the Zoning Administrator has determined that there is no ordinary high water mark on our land.

Also, your Honor, we expect to bring in testimony of other survey data, other maps, other aerial photographs. We also will be talking about the fact that our property is separated from the lakeside by two roads, which effectively form a couple of dams and our property is part — and part of it actually lies within the golf course adjacent to us and the golf course used upwards of, maybe, a million gallons of water a day to water their greens and fairways and the ordinary course for that water to take is across our property.

We also have a situation where water out there may be shown by the fact that we have got a flowing well, so when we talk about some water on our property, where it is and where it is flowing from, there are artificial courses of that.

Those, your Honor, are the issues as the Defendants see them and some of the evidence that we feel will be material on your decision on this.

THE COURT: Do you think we are going to finish this tomorrow?

MR. MARTELL: Yes.

APPENDIX I

Q Are you familiar with what kind of vegetation is shown?

A Yes.

Q And can you describe generally, for example, what the taller plants are in that area?

A The taller ones are Tamaracks, which is easy to tell in this picture because they are turning color.

THE COURT: Which picture?

THE WITNESS: Exhibit 6.

BY MR. DOSCH:

Q And when you refer to the Tamarack, what are you referring to?

A The lighter color in the area, the higher trees are Tamaracks.

Q Where are they in relation to the road?

A They would be south of Mandaman (sic) Trail, east of the Port Road and west of the golf course.

Q Now, Mr. Knitter, is the water you observed standing on the site of the Marina Point Condominium parcel hydraulically connected to Lake Superior?

A Yes.

Q Can you explain how it is so connected?

A Well, basically, the area in question is a runoff area from the golf course where surface water does move through the area in, I would say, a westerly or northwesterly direction.

When Port Road was built, culverts were put in, otherwise we would have the separate body of water or separate lake back here much higher than the elevation of Lake Superior proper, therefore, the culverts were installed. You will get in a wet situation or vegetation where the water moves too slowly, so you will get some gradiation or gradient for the water to actually move through there, so we would expect the water to be higher back in here, like several tenths of a foot, to get a hydraulic drain so the water can move. Water will not move if is flat.

Q Have you ever observed the hydraulic connection between the Defendant's property and Lake Superior?

A Yes.

Q And would you describe what you observed?

A At the culvert indicated on Exhibit 13 I observed water going in both directions through the culvert, coming from Lake Superior into the area and also coming from the area going into Lake Superior.

Q Was this on different occasions?

A Yes.

Q Explain how it happened to be flowing in different directions?

A Basically, the wind directions will push water and if you are familiar with wind actions on the Great Lakes you will know that water moves in and out of these areas continuously according to the direction of the wind. A perfectly still day you may not get any movement at all.

Q Mr. Knitter, would you describe the area of the Marina Point Condominiums as a distinct lake or lagoon separate from Lake Superior?

A Would I describe it as separate?

Q As a distinct lake or lagoon, distinct from Lake Superior?

A No.

Q Because of the road?

A No.

Q Why not?

A First of all, the road was a man-made road, the area where the road is, itself, by looking at that aerial photograph the same basic vegetation as in the area we are discussing.

Q Does the relative elevations come into play?

A Yes, and the hydraulic connection.

Q Now, Mr. Knitter, there has been some artificial alteration of the shoreline in this general area, hasn't it?

A Yes, there has.

Q Can you describe in summary terms what has taken place?

A Basically, the big alteration was, of course, the construction of the Marina in, I believe it was, 1964 or 1965, at which time the road — I am not sure if it was called Port Road — maybe it was called Main Street — was removed. The Marina development, of course, enlarged the area and then the new road was constructed, which is called Port Road, which does separate the area of the Marina and the area in question.

Q Do you have an opinion as to whether or not the area involved in Marina Point Condominiums project was naturally hydraulically connected to Lake Superior by land below the ordinary high water mark?

MR. MARTELL: Excuse me, your Honor.

MR. DOSCH: I am asking if he has an opinion.

THE WITNESS: Yes.

BY MR. DOSCH:

Q You do have an opinion?

A Yes.

Q What is the basis for your opinion?

A I think the basis of my opinion, I have reviewed the aerial photographs, the original aerials taken in 1939, aerial photographs taken in 1950, present configurations of the area, I looked at the original Government Survey Maps, another map of the City of La Pointe, which Mr. Martell had, the area in question drained an area of Madeline Island immediately to the east of this area and we know by looking at the photograph that there was a bridge and a direct hydraulic connection in the past, in the 30's. We know that the water has got to get out of there, otherwise, if it didn't get out of there it would be a distinct lake by itself.

Q And have you ever found any indication that there was a distinct lake in that area?

A None.

Q You have referred to the fact that you inspected certain aerial photographs in forming your opinion that this area may or may not have been hydraulically connected before the artifical things associated with the Marina —

(Whereupon, Exhibit Number 16 was marked for identification.)

BY MR. DOSCH:

Q Mr. Knitter, I would like to refer to your attention what has been marked as Exhibit 16; with the Court's permission I would like to have Mr. Knitter approach the Exhibit.

THE COURT: He may approach the Exhibit.

BY MR. DOSCH:

Q Mr. Knitter, can you identify what is marked as Exhibit 16 as an aerial photograph, a blown-up aerial photograph taken on July 26, 1939 as indicated in the upper left-hand corner, the numbers in the upper right-hand corner are the role number, the film number and the negative number in that roll?

A This is a blow-up of the negative to an approximate scale of one-eighth to 400 feet.

Q What is portrayed in this particular photograph?

A Exhibit 16, of course, in the center of the photograph is the approximate area of the development that we are talking about. La Pointe is showing up here with the old road coming down, going through the middle where you see a dark blue area or black area. The black area was indicated to be between what people call the open water of Lake Superior, shows a black area of open water up to the road. A bridge is located there, and then there is black again behind that back to the east, which is open water, which would indicate a direct hydraulic from their contiguous wetland to Lake Superior.

Q Mr. Knitter, can you approximate on this photograph by making an X the location of the Marina Point Condominium?

Mr. Knitter, is that an approximation or an actual scale?

A No. That is an approximation, not the exact location.

Q Have you examined any other photographs, aerial photographs, for the purpose of determining whether or not the water involved in the Marina Point Condominiums project were connected before any artificial means were employed?

A Yes.

MR. DOSCH: I have several photographs from the custody of the United States Soil Conservation Service, which they insist they want back. With the Court's leave, I would like to substitute authenticated copies in several weeks. It takes that long to get copies.

THE COURT: Are those the originals?

First of all, does anybody have any objection to that procedure, because, if they do, if we put them in evidence they are stuck there.

MR. DOSCH: They are stuck in there unless we can agree to it.

MR. MARTELL: I have a problem agreeing in advance that copies to be substituted will serve the purpose for which the originals are being offered, however, I certainly will do everything I can to accomodate (sic) the request. I have a general objection to the procedure, but if the copies to be substituted turn out not to be reliable, then I would have to have some mechanism to protect myself.

THE COURT: Let's not waste any time on such an issue. If you are going to put them in it will be done on that condition if the copies are reliable.

MR. DOSCH: Mr. Knitter is the person who obtained custody and has worked with these before. He can advise the Court.

THE WITNESS: It takes approximately a month to obtain copies. The copies are certified by the United States Department of Agriculture and correct copies from the negatives. In fact, most of the time they are better quality than these because they have not been handled or used.

THE COURT: What are you asking me to do?

MR. DOSCH: I would just like the assurance we can get these back to the Soil Conservation Service.

THE COURT: You don't have that assurance. You can mark them, but until they are admitted in evidence they won't apply until everybody in connection with this case is satisfied with the copies.

MR. DOSCH: It is my understanding that facts and materials relied upon by an expert for an expert opinion need not by themselves be admissable in evidence.

I will mark them for Mr. Knitter's reference. He can make what use of them he finds necessary.

(Whereupon, Exhibit Numbers 17 through 22, inclusive, were marked for identification.)

BY MR. DOSCH:

Q Mr. Knitter, I am going to show you a series of photographs which have been marked as Exhibits. First, I will show you what the Court Reporter has marked as Exhibit Number 17 and ask if you can identify what this is?

A Exhibit 17 is a print exactly as Exhibit 16, only it is a small, compact size.

Exhibit 18 is an adjacent photograph in that flight line. The reason I have two photographs, it allows me to view the area in three dimensions.

Q What are the photograph numbers of each Exhibit?

A Exhibit 17 is a photograph BRN-9-49.

Q And Exhibit 18?

A Photograph BRN-9-50.

Q And of what use are stereo photographs?

A Basically, first of all, you view it in three dimensions. It is also a magnification and you can determine elevations, basically of how your trees are. In other words, the trees will pop out at you. You can determine open water areas easily, wetland types of vegetation. You can determine the delineation lines, basically.

Q And Exhibits 17 and 18 were taken on what date?

A July 26, 1939.

Q I would like to ask you to do the same thing with respect to Exhibits 19 and 20; identify what they are and what they depict?

A Exhibit 19 is a photograph number BRN-12G-41. Exhibit 20, photograph number BRN-12G-40.

Q Are Exhibits 19 and 20 a stereo pair?

A Yes, they are. They were taken on July 23, 1951.

Q Finally, would you identify Exhibits 21 and 22?

A Exhibit 21 is a photograph taken July 2, 1980 and the number is 550-3-280-229.

Q What dates?

A Exhibit 22 is again taken July 2, 1980, number 550-03-280-228.

Q Mr. Knitter, have you observed the various pairs of photographs taken on the different dates with a stereo viewer?

A Yes, I have.

Q Was that for the purpose of determining the hydraulic connection of the area under the Marina Point Condominiums prior to the time the Marina was installed?

A Yes.

Q Can you, for the Court, set up the 1939 photos on the stereo viewer?

Judge, if you are interested in seeing how these work or opposing Counsel —

THE COURT: We can all probably come up and look.

MR. MARTELL: Your Honor, I happen to have one eye that is nearsighted and one farsighted. May I ask William Sherman, who is a registered Land Surveyor, look at the photograph?

THE COURT: Very well.

BY MR. DOSCH:

Q Mr. Knitter, have you examined these various stereo pairs of photographs marked as Exhibits 17 through 22 with the stereo viewer?

A Yes, I have.

Q Based on your examination of those stereo photographs and Exhibit Number 16, do you have any opinion as to whether or not the area underlying the Marina Point Condominiums was hydraulically connected to the main body of Lake Superior prior to construction of the Marina?

A Yes.

Q What is your opinion?

MR. MARTELL: I will object on the ground it is immaterial.

THE COURT: Overruled.

MR. DOSCH: I would like to just advise the Court why we are putting this in.

THE COURT: Okay.

MR. DOSCH: I don't believe the State is obliged to show there was at all times lake bed from 1948 on. My opening argument was that common law can operate to change the State's right.

THE COURT: Objection overruled.

MR. MARTELL: Your Honor, —

THE COURT: I am not saying he is right by overruling the objection.

MR. MARTELL: I simply wanted to preserve the objection that hydraulically connected is not the proper standard to determine the litigation. I didn't want the opinion to go in without objection.

BY MR. DOSCH:

Q Mr. Knitter, what is your opinion on that issue?

A That the area is hydraulically connected.

Q Was it hydraulically connected prior to the construction of the Marina?

A Yes.

Q Mr. Knitter, just to clarify the significance of Exhibit 13 which you have prepared, have you observed any structures on the land described by Exhibit 12 which are below 602.0 I.G.L.D.?

A Only a portion of Cluster A.

Q Are there any other structures or improvements that are on land below 602.0?

A Oh, I would say — I wouldn't call them structures. I would call it the fill for the parking lot, yes, I would say it is below 602.

Q Is all of the parking lot below that line?

A No. Probably anywhere from —I can't tell for sure because it is covered up.

Q What is your basis for your opinion that part of the parking lot is on land below 602.0?

A Basically, two. One, the contour indicated on the map on Exhibit 12 plus looking at the aerial photographs prior to their development.

(Whereupon, Exhibit Number 23 was marked for identification.)

BY MR. DOSCH:

Q Mr. Knitter, I am showing you what is marked as Exhibit Number 23; can you identify what this is?

A Exhibit 23 is a certification that a search was made of the records in the general files of the Department and were unable to locate any authority having been issued to the Trudeau Development, Trudeau Construction.

Q To what does that refer?

A Permits under Section 30.12 for a construction of condominiums or any authority to the Town of La Pointe under Town Ordinance 37 for a bulkhead line to Lake Superior.

Q Does that concern your own search for either 30.12

APPENDIX J

ordinary high water mark, is that right?

A. Yes.

Q. It indicates to a person that the principal indication is the change from water plants to land plants, is that right?

A. Yes.

Q. And the ordinary high water mark is the point on the bank or shore where the water is present often enough so that the lake or stream bed begins to look different from the upland?

A. Specifically, the ordinary high water mark is the point on the bank or shore up to which the water presents wave action — A distinct mark on the shore or bank.

Q. The mark may be indicated by relocation, destruction, or change in vegetation, or other easily distinguishable characteristic, is that right?

A. Yes.

Q. Did you either write or approve this exhibit before it was disseminated to the public?

A. I believe our chief biologist wrote that one.

Q. Did you review it or approve or have any input in it at all?

A. Yes.

Q. What did you do in participating in the process that led to Exhibit 43 being circulated?

A. Just reviewed it.

Q. Exhibit 44 speaks to the concept of navigability, is that right?

A. Yes.

Q. It talks about when the general public would find water being navigable, is that right?

A. Yes.

Q. And that would indicate whether the waterway is public or private, is that right?

A. Yes.

Q. That's one of the purposes, or may be the purpose of this pamphlet? To let people know what water — public water or private water is, is that right?

A. That was the purpose.

Q. And I assume from that then that there's such a thing as private water in the State of Wisconsin.

A. Yes.

Q. And does Exhibit 44 indicate what the test of navigability is?

A. Using the smallest water craft common to a region. Usually a canoe.

Q. Did the DNR staff paddle through the water? Is that what it says?

A. Yes.

Q. Did you or any member of your staff paddle a canoe on the Marina Point property?

MR. DOSCH: Objection, Your Honor. That question is irrelevant. We have never claimed you can canoe on the property. The whole issue in this case is whether the area is connected to Lake Superior. And we have stipulated Lake Superior is navigable.

THE COURT: All right, what I'm going to do — I'm going to let him answer that question, and we'll have to determine whether it's navigable. I think you two have a disagreement on the issue as to what the law is. Maybe it's irrelevant, maybe it isn't. I will have to determine that later. I can't determine that now. Go ahead.

BY MR. MARTELL:

Q. Did you or any DNR staff member paddle a canoe on the Marina Point property at any time?

A. I did not.

Q. Did any member of the DNR staff to your knowledge?

A. No, not to my knowledge.

Q. Do you know as to that ever happening in connection to this litigation?

A. In just this summer, yes.

Q. You're saying this summer it did?

A. No. This summer no DNR staff that I knew of. That's what I'm saying.

Q. Oh, I see. You used the phrase in your direct examination several times, water "hydraulically connected" to lake (sic) Superior, is that correct?

A. Yes.

Q. Is the term "hydraulically connected" a technical engineering term?

A. No, I wouldn't say so.

Q. Is it a term of art in any way in dealing with the flow of water?

A. It could be.

Q. Is "hydraulically connected" a term that is used to your knowledge in any Department of Natural Resources publication?

A. Not to my knowledge.

Q. Isn't it true that "hydraulically connected" is a term that you and Mr. Dosch agreed upon was a term that could be used for the purposes of this litigation to describe a nexus between the Marina Point property and Lake Superior?

A. No.

Q. Is it a term that is written down anywhere that you know of where we could go read what the DNR says is "hydraulically connected"?

A. I don't believe so.

Q. Could a member of the general public who wanted to comply with the law find anywhere in the Department of Natural Resources a written definition of "hydraulically connected"?

MR. DOSCH: Your Honor, I will stipulate that is the term I used in my questioning of Mr. Knitter.

THE COURT: All right, will you stipulate that it's not a term of law?

MR. DOSCH: It's the words I used to describe a connection by water. That's what "hydraulically connected" means.

MR. MARTELL: I will so stipulate that that's the way it's used, and that's the basis of a motion to strike the direct testimony of the witness in which he based his opinion on "hydraulically connected."

MR. DOSCH: Your Honor, it's just a word out of the dictionary.

THE COURT: I looked it up myself last night in the dictionary. You may proceed.

BY MR. MARTELL:

Q. Does a "hydraulic connection" as you used that term on direct examination mean above ground connection?

A. Above ground connection?

Q. Yes.

A. A connection above the bed of the lake, yes. The bed of a lake, if you call that ground, yes.

Q. As you used that term — a connection where the water that you are referring to is below the visible surface of ground?

A. No.

Q. So that if the water disappears from view on the surface, there's no "hydraulic connection" as you used the term?

A. I'm referring to culverts which is not visible.

Q. Where does the water come from that you refer to as being "hydraulically connected?"

A. Where does it come from?

Q. Yes. Are you talking here about water that's "hydraulically connected" to Lake Superior because it comes from Lake Superior or because it comes from someplace else?

MR. DOSCH: Objection. Irrelevant.

THE COURT: I'm going to permit that because up to this point at least, I think it's the defense's claim that some of the water is coming from the golf course, is that correct?

MR. MARTELL: Yes, Your Honor.

THE COURT: I don't know what the answer is yet, but I'm going to listen to it.

MR. DOSCH: I don't like interrupting, but I do want to reserve my objection that it's not legally relevant.

THE COURT: It could well be. We'll see.

MR. KNITTER: The water that I saw that was there came from Lake Superior through the culverts which is not the area in question. I also saw the water from the area in question go the other way into the Marina and Lake Superior.

BY MR. MARTELL:

Q. When you used the term "hydraulic connection" to describe some kind of relationship between two areas of water, are you concluding that water is running off, like from rain? Are you using the term "hydraulic connection" to include rain water run-off, where that rain water may be stored or dammed temporarily on an artificial basis? Is my question clear?

A. Well, the water that's in the area definitely comes from run-off. Run-off springs, etc. It's run through that area which is the reason that it is a wetland area because the water is moving slowly through an area.

Q. Where does it move to?

A. It moves out the culverts and where I'm saying it's connected to the lake.

Q. If there were no culverts, then there would be no "hydraulic connection" to the lake?

A. If there were no culverts there would not be a "hydraulic connection" until the point where it filled up and formed it's own lake and washed out the road. Then it would become connected again.

Q. If that ever happened?

A. It would.

Q. Is that because of run-off from the golf course?

A. Run-off from the whole general area, not just the golf course.

Q. That would be run-off from higher ground, is that right?

A. Yes.

Q. Is that higher ground "hydraulically connected" to the lake because of the run-off as you used the term "hydraulic connection?"

A. No.

Q. So the simple fact that you have water moving across property does not mean that that water is "hydraulically connected" to the lake even though that water ultimately winds up in the lake, is that right?

A. Well, the water that runs across the golf course is not "hydraulically connected" to the lake.

Q. Even though it was pumped out of the lake in the first place and sprinklered on to the golf course. Then it runs back through their property. That would make it "hydraulically connected?"

A. The golf course?

Q. Right.

A. No.

Q. The golf course is not "hydraulically connected," is it?

A. No.

Q. Part of our lot is on the golf course, isn't it?

A. Yes.

Q. So that part of our property is not "hydraulically connected" to the lake, is that right?

A. That's correct.

Q. Do you need some form of continuity then for "hydraulic connection?"

A. What do you mean by continuity?

Q. So there's water all the way?

A. No.

Q. Do you need any form of geographic continuity so there's water during all times of the year as you use that term?

A. No.

Q. And if I understand correctly, you could have water flowing with just elevation differences of several hundredths of an inch?

A. Yes.

Q. I'm sorry. Several hundredths of a foot I think you testified?

A. Yes.

Q. And a hundredth of a foot is about an eighth of an inch, is that right?

A. Approximately.

Q. Your role as Assistant Chief of Water Regulations Section having enforcement over Chapters 30 and 31, do you have control over the files of the Department of Natural Resources that reflect applications for permits?

A. Yes.

Q. Historically?

A. Yes.

Q. You're familiar with the fact that the Marina was enlarged about 1965 and 1966 — There's some variance in the actual years — But about that time, is that correct?

A. Yes.

Q. And in mid-sixties, in order to dredge out that Marina, that would have reguired permission from the Department of Natural Resources or its predecessor, is that right?

A. Yes.

Q. And to relocate the road, take down the bridge, that would have required your permission, would it?

A. Yes.

APPENDIX K

BY MR. DOSCH:

Q. You heard Mr. Twining testify of the drying up of certain wetland areas, didn't you?

A. Yes.

THE COURT: Wait a minute. Go ahead.

BY MR. DOSCH:

Q. Can you account for the description Mr. Twining made of the drying up of the wetland areas?

A. He indicated that it was 1957, I believe. And in the late fifties Lake Superior was approximately 1.5 feet lower than it is today. We could account for considerable drying up in that area.

Q. Is the level now higher than it was in the late 1950s? — The level of Lake Superior?

A. Yes.

Q. Mr. Knitter, I'm going to set in front of you a number of exhibits submitted by the defendants in this case. I'd like you to refer to these photographs by exhibit number in your responses to my next several questions. Yesterday you testified as to the — I think the expression you used yesterday was "hydraulic." You testified today as to what that term means, but as I recall, your testimony indicated there was some connection — hydraulically, or by water — Naturally before the marina was developed — from the vicinity of the site of the Marina Point Condominium Project to the main body of Lake Superior. Have you had an opportunity to examine Exhibits 38, 33, 35, and 36 concerning your testimony yesterday?

A. Yes.

Q. Does your examination of those exhibits in your opinion support or contradict your earlier testimony?

A. I believe in my review of the photos it supports it considerably.

Q. And would you explain your reasoning prior to the marina being installed?

A. The photograph in Exhibit 33 shows an open water area in the marsh behind extending towards the point in question. It also shows open water going to the north and it shows, of course, the bulkhead on the shore here (Indicating.) Yes, it is part of Lake Superior. Very much connected to Lake Superior.

Q. Do the other photos? Exhibits other than Exhibit 33?

A. The other exhibits from after the marina has been constructed and, of course, the entire area has been changed. But now the open water is where Mr. Nelson indicated they dug the channel and dug the pond and in making into basements.

Q. I have no further questions of this witness.

APPENDIX L

A Unless I wanted to spend a whole lot of time on it I would go to Hamilton Nelson Ross. He studied, so far as I can tell, with a great deal of love and care.

Q And what access do you have to the studies of Mr. Ross?

A Well, in addition to the published books we have at the Area Research Center at Northland College, which is an adjunct of the State Historical Society — there are research centers at State Universities and at Northland College, but we have his working papers from which he wrote his manuscript and the published version was based on that. This was an opportunity to see how he worked.

Q And, in your opinion, do you believe that his work and his descriptions of the Madeline Island area are fair and accurate or historically correct?

A Those that you can check certainly seem to be.

Q You were sitting in the Courtroom today when Mr. Elmer Nelson testified, weren't you?

A Yes.

Q And you heard his descriptions of a lagoon on Madeline Island described in Exhibits 34, 35, 36, which are in front of you?

A Yes.

Q And which is shown on Exhibit 16?

A Yes.

Q On the basis of your historical investigation do you have an opinion as to whether or not this body of water shown on Exhibit 16 and the photos I have just referred to was hydraulically connected to the main body of Lake Superior?

A I have an opinion based upon what I have read.

Q And in forming your opinion did you rely on any particular documents or books or maps, drawings, that you have investigated?

A Well, I went and checked the Ross book and then I went back and looked at the Ross papers to see that the representations in the book were accurate as he intended it.

I found, for example, his working map of this lagoon, which he describes as the contours of 1852. He uses contours related to mean shoreline, which is changed in various areas.

MR. DOSCH: I am going to ask the Court Reporter to mark a document here.

(Whereupon, Exhibit Number 40 was marked for identification.)

BY MR. DOSCH:

Q Mr. Twining, I am showing you what has been marked as Exhibit 40; can you tell the Court what this is?

A This is what we call a manuscript map. This is a map prepared by Mr. Ross for inclusion in the book and it does appear in the book in this same form.

Q What does that map purport to describe?

A Well, it says, "Missions of 1835." Then it says in the book, "The Missions of the 1830's," and the location of various Mission Churches, of the old French Fort called the Mid-

dle Fort, which was built in 1718, the Protestant Mission and then the Indian Burying Ground and the entrance to what he calls the lagoon and there is some indication of the swamp land behind it.

Q Does the lagoon on that map correspond to the bodies of water located in the center of Exhibit 16 and the aerial photos which are marked Exhibits 33 through 36?

A I would guess it would have to be.

Q Does the map that you have marked as Exhibit Number 40 indicate the extent of the so-called lagoon; how far inland it goes?

A It would appear from this that it crosses over the section line of Section 31 into Section 32, a distance, then the surrounding marsh being even larger.

MR. MARTELL: Excuse me. Would you point out for me the reference to Section 32 on there?

THE WITNESS: Well, I take it this is the section line. This is Section 31, then that should be Section 32.

MR. MARTELL: The Northeast Quarter of the Northeast Quarter of Section 31, Town 51, Range —

A Yes.

MR. MARTELL: Do you find there a division between Government Lot 1 and a portion of Section 31?

THE WITNESS: Right. That would be it, yes.

MR. MARTELL: Is there any portion —

MR. DOSCH: I would object. You are questioning my Witness at this time. Perhaps, you could save it for Cross Examination. (sic)

THE WITNESS: Yes, yes.

MR. MARTELL: Thank you.

THE WITNESS: This is Section 31, yes.

BY MR. DOSCH:

Q Mr. Twining, does that map indicate whether or not there is a hydraulic connection between the lagoon and the lake?

A It shows an entrance to the lake.

Q Did you find any other maps or documents relating to the contours of the so-called lagoon at or prior to Statehood, 1848?

A No, I didn't. I didn't look further for other maps. He had other references to this. This isn't the only map of this area.

Q Did you find any indication in your research as to whether or not the lagoon had, in fact, been navigated at the times indicated, the approximate times of the 1830's on that map?

A Well, apparently, after the Treaty of Utrecht and the French were putting greater emphasis into this, they lost, by the treaty, the right to the area that drained into Hudsons Bay and they endeavored to put more effort into what remained of their fur trade and they built a new fort on Madeline Island in 1718 and apparently they selected this site because — at least in part — partly to protect the harbor, but also the lagoon.

Mr. Ross makes reference to this as being an important area for the sheltering of canoes and so forth. This was a factor in the selection of the site.

Q Why was navigable access to a lagoon important in those days?

A Well, it had to have been important in terms of shelter for the canoes. Of course, you can pull canoes up on beaches and so forth. Often times, canoes were in the state of transshipment and there wasn't necessarily the starting or stopping point, but a stopping place, so the goods were extremely valuable and, of course, the canoes themselves were valuable so anything that would shelter them would be of large importance, something far more important than you can imagine today.

Q Does the map that you have marked as Exhibit 40 indicate whether or not the lagoon extends east of old Port Road?

A Yes. In fact, it appears that it extends farther east than west here. There is more lagoon on the east side of the road than between the road and the lake.

MR. DOSCH: I have no other questions of this Witness at this time.

I would move the admission of Exhibit 40.

THE COURT: Exhibit 40 is admitted in evidence.

MR. DOSCH: And Exhibit 39, the resume.

THE COURT: 39 is admitted in evidence.

(Whereupon, Exhibit Numbers 39 and 40 were received in evidence.)

THE COURT: Mr. Martell?

CROSS EXAMINATION

BY MR. MARTELL:

Q Mr. Twining, when was Exhibit 40 prepared?

A The book was published in 1960, so one would presume a year or two in advance of that.

Q Who prepared the map, if you know?

A This, to my knowlege, is the work of Hamilton Nelson

APPENDIX M

Town of La Pointe?

A I presume there does. I don't know.

Q Did you look at the records to determine that, in fact, there is a plat of the Town of La Pointe existing since 1854?

A No.

Q Let me see if we can do this — maybe we can't.

Mr. Twining, is there any way that you, yourself, could relate what I am going to relate to you as a copy of the plat of the Town of La Pointe in 1854 to the areas we are concerned with in this matter?

MR. DOSCH: Objection. It is, in fact, not in evidence. That document has not been admitted.

THE COURT: Mr. Martell, do you know how authentic it is?

MR. MARTELL: That is absolutely correct. I want to know from this Witness if he will be able to do that.

THE COURT: If he has seen that before?

MR. MARTELL: If he is able to relate that to our matter.

THE WITNESS: I would have to study it. Where is the north line?

THE COURT: I think you should probably ask if he know (sic) that it is the plat.

BY MR. MARTELL:

Q You didn't make a search of the records for such things as surveys and plats?

A No.

Q What you did was make a search of Mr. Ross' records and came up with the map you brought here today, right?

A Right.

Q You have talked about the lagoon on Exhibit 40, is that correct?

A Yes.

Q Would you draw the limits of what you refer to as the lagoon?

MR. DOSCH: Your Honor. I would object to his marking my Exhibits with a black pen. Perhaps, if it could be some other color so as to avoid any confusion as to what was on there prior to the marking.

MR. MARTELL: I have given the Witness a red pen.

BY MR. MARTELL:

Q And what you have drawn the red mark around is the lagoon that you refer to, is that right?

A Yes.

Q And I believe from your earlier testimony you indicated what you have drawn a red mark would all be within Section 31, is that correct?

A Right.

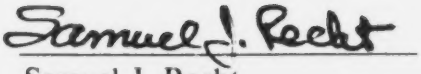
MR. MARTELL: Thank you.

MR. DOSCH: Are you done?

RULE 28.1 LISTING

Trudeau Development, Inc., Trudeau Constructions, Inc., and Superior Development, Inc., have no parents, subsidiaries or affiliates.

Respectfully submitted,



Samuel J. Recht
(Counsel of Record)
David L. Petersen
Susan LaCava
Quarles & Brady
411 East Wisconsin Avenue
Milwaukee, WI 53202-4497
(414) 277-5000
Counsel for Petitioners

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